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**TRANSCRIPT OF RECORD**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1940**

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**No. 200.**

**RECONSTRUCTION FINANCE CORPORATION,  
PETITIONER**

**vs.**

**J. G. MENIHAN CORP., J. G. MENIHAN, SR., AND J. G.  
MENIHAN, JR.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT**

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**PETITION FOR CERTIORARI FILED JULY 2, 1940  
CERTIORARI GRANTED OCTOBER 14, 1940**

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1 In United States Circuit Court of Appeals  
for the Second Circuit

J. G. MENIHAN CORP., J. G. MENIHAN, SR., AND J. G. MENIHAN,  
JR., DEFENDANTS-APPELLANTS

vs.

RECONSTRUCTION FINANCE CORPORATION, PLAINTIFF-APPELEE

*Statement under rule XIII*

This suit in equity was begun in the Western District of New York by the filing of a bill of complaint and the service of an equity subpoena on the defendants on or about September 30th, 1937. The original plaintiff was Reconstruction Finance Corporation. The original defendants were J. G. Menihan Corp., J. G. Menihan, Sr., and J. G. Menihan, Jr. There has been no change in parties.

All defendants joined in one answer, which was filed October 16, 1937. No property was attached, and there was neither an arrest nor a temporary injunction. The issues raised by the pleadings were tried in open Court without a jury on January 24, 25, 26, and February 6, 1939, at Rochester, New York, before Honorable Harold P. Burke, United States District Judge for the Western District of New York. No question was referred to any commissioner, master, or referee. The final decree was filed November 13, 1939, and the order denying defendants' application for an additional allowance was filed October 31, 1939. The notice of appeal was filed November 17, 1939.

There has been no change of parties or attorneys and the names of the parties are given in full in the above title.

In United States District Court, Western District of New York  
In Equity No. 2174

RECONSTRUCTION FINANCE CORPORATION, PLAINTIFF

vs.

J. G. MENIHAN CORP., J. G. MENIHAN, SR., AND J. G. MENIHAN,  
JR., DEFENDANTS

*Notice of appeal*

Filed Nov. 17, 1939

Notice is hereby given that J. G. Menihan Corp., J. G. Menihan, Sr., and J. G. Menihan, Jr., defendants above named, hereby

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## RECONSTRUCTION FINANCE CORP. VS. J. G. MENIHAN CORP.

3

appeal to the United States Circuit Court of Appeals for the Second Circuit from the order entered herein on October 31, 1939, denying defendant's application for costs, and from so much of the final decree herein as resettled and entered herein on November 13, 1939, as denies costs to the defendants.

Dated November 15, 1939.

WERNER HARRIS & TEW,  
by GEORGE H. HARRIS,

*Attorneys for Appellants,*  
*J. G. Menihan Corp., J. G. Menihan, Sr., and J. G. Menihan, Jr.,*  
*Address, 610 Union Trust Bldg., Rochester, New York.*

TO ABBOTT, RIPPEY & HUTCHENS,  
*Attorneys for Plaintiff, Reconstruction Finance Corporation,*  
*615 Powers Building,*  
*Rochester, New York,*

and to

MAY C. SICKMON,  
*Clerk, United States District Court, Western District of New York.*

4

In United States District Court, Western District of New York

[Title omitted.]

## Decree

The above cause having come on for trial at Rochester, New York, Hon. Harold P. Burke, United States District Judge presiding, on January 24, 25, 26 and February 6, 1939, and the plaintiff having appeared by its attorneys, Abbott, Rippey & Hutchens, Rochester, New York, and by Nims & Verdi, Percy E. Williamson, Jr., and Walter J. Halliday, of New York City, of counsel, and the defendants appearing by Werner, Harris & Tew, Frank Keiper of Rochester, New York, of counsel, and the Court having considered the evidence and having made findings of fact and conclusions of law, and this decree having been resettled by order dated November 13th, 1939, now on motion of Werner, Harris & Tew, attorneys for the defendants, it is

Ordered, adjudged, and decreed;

5

1. That the plaintiff is not entitled to relief.
2. That the complaint be, and the same hereby is dismissed without costs, costs being denied upon the ground

that the imposition of costs against the plaintiff, a governmental agency, is not permitted by law.

Dated November 13, 1939.

HAROLD P. BURKE,  
*United States District Judge.*

In United States District Court, Western District of New York

[Title omitted.]

*Order*

The defendants having moved for an additional allowance and the matter having come on for argument on September 5th, 1939, George H. Harris appearing in support of said motion and Harold G. Hutchens in opposition thereto, and having considered the affidavit of George H. Harris verified August 22nd, 1939, and his further affidavit verified September 13th, 1939, and the affidavit of Jeremiah G. Menihan, Sr., verified September 13th, 1939, and upon due consideration, it is

Ordered that the said motion be and the same hereby is denied upon the ground that the imposition of costs against the plaintiff, a governmental agency, is not permitted by law.

Dated October 31, 1939.

HAROLD P. BURKE,  
*United States District Judge.*

In United States District Court, Western District of New York

[Title omitted.]

*Statement under Rule 76*

1. This suit was begun in the United States District Court for the Western District of New York by the plaintiff, Reconstruction Finance Corporation, against the defendants, J. G.

Menihan Corp., a New York State Corporation, and J. G. Menihan, Sr., and J. G. Menihan, Jr., both residents of Rochester, New York, where the defendant corporation had its principal place of business. It was commenced by the personal service of a subpoena on or about September 30th, 1937.

2. The complaint alleged, in substance, that the plaintiff was the owner of certain trademarks; that the defendants had infringed, and were infringing the same, and were likewise engaged in unfair competition with the plaintiff. The relief sought was an injunction, both temporary and permanent, an accounting, treble damages, and costs.

All defendants united in one answer, placing in issue all the material allegations of the complaint, and setting up certain affirmative defenses. The answer demanded dismissal of the complaint with costs.

3. The cause came on for trial at Rochester, New York, in the District Court of the United States for the Western District of New York before Honorable Harold P. Burke, United States District Judge, without a jury and was tried on January 24, 25, and 26, and February 6, 1939, and was submitted on briefs of counsel.

On July 31, 1939, Judge Burke handed down a decision directing the dismissal of the complaint, and settlement of findings and a decree.

4. Findings were prepared, submitted, and signed, and a decree entered on October 19, 1939, dismissing the complaint without costs. Prior thereto the defendants made an application for an extra allowance of costs. This application was denied on October 31, 1939, "on the ground that the imposition of costs against the plaintiff, a governmental agency, is not permitted by law."

On November 13, 1939, defendants made an application to resettle the original decree, and the same was resettled by adding at the foot thereof the phrase:

"Costs being denied upon the ground that the imposition of costs against the plaintiff, a governmental agency, is not permitted by law."

5. The present appeal is taken from the order of October 31, 1939, and from so much of the final decree as resettled on November 13, 1939, as denies costs to the defendants.

6. To be annexed hereto and taken herewith as constituting the record on appeal are the notice of appeal, the decree as resettled November 13, 1939, the order of October 31, 1939, the opinion of Judge Burke dated July 21, 1939, dismissing the complaint herein, and the opinion of Judge Burke dated October 31, 1939, denying defendants' application for an extra allowance.

7. The point raised by the defendants upon this appeal is that costs against the plaintiff are permitted by law, and that the learned Trial Court was in error in holding otherwise.

Dated November 20, 1939.

WERNER, HARRIS & TEW,  
Attorneys for Defendants-Appellants,  
by GEORGE H. HARRIS,  
ABBOTT, RIFFEY & HUTCHENS,  
Attorneys for Plaintiff,  
by HAROLD G. HUTCHENS.

This statement conforms to the truth, and is approved as presenting the questions raised by the appeal.

Dated December 9, 1939.

HAROLD P. BURKE,  
*United States District Judge.*

10 In United States District Court, Western District of  
New York

RECONSTRUCTION FINANCE CORPORATION, PLAINTIFF

vs.

J. G. MENIHAN CORP., J. G. MENIHAN, SR., and J. G. MENIHAN,  
JR., DEFENDANTS

Appearances: Abbott, Rippey & Hutchens, Rochester, N. Y.,  
Attorneys for Plaintiff (Nims & Verdi, New York City, by Percy  
E. Williamson, Jr., and Walter J. Halliday, of counsel). Werner,  
Harris & Tew, by George H. Harris, Rochester, N. Y., Attorneys  
for Defendant (Frank Keiper of counsel).

*Decision by Burke, D. J.*

This is a suit to enjoin trade-mark infringement and unfair  
competition. The plaintiff asks for an injunction against the use  
of the word "Menihan" either as a trade-mark or as part of a  
corporate name and against the use of the terms "Arch Aid" or  
"Menihan Arch Aid" as trade-marks for shoes. An accounting is  
also demanded.

The Menihan Company from which the plaintiff acquired its  
rights to the trade names and trade-marks in question was in the  
business of manufacturing and selling shoes. The business  
11 prospered until about the year 1929 when its annual net  
sales were upwards of \$3,000,000. From that time on the  
business of the company gradually receded. In 1934 it applied to  
the plaintiff for a loan. The Menihan Company had advertised  
and sold its product by the aid of the marks "Menihan" and  
"Arch Aid" and it did a nation-wide business. It distributed its  
shoes by maintaining retail shop of its own and by sales agencies  
with shops in many of the principal cities throughout the United  
States and Canada. Three separate loans were made by the  
plaintiff to The Menihan Company, the aggregate amount of which  
was \$250,000, and as security for which the plaintiff took mort-  
gages and assignments of the real and personal property of the  
Menihan Company, including its trade-marks and trade names.  
The Menihan Company defaulted and in December of 1936 was  
was adjudicated a bankrupt. At a public sale conducted by the

Trustee in Bankruptcy the plaintiff purchased substantially all of the real and personal property of the bankrupt, including the good will, trade-marks, and trade names.

In January 1937 the defendant corporation was formed. The defendant, J. G. Menihan, Sr., who had been president of The Menihan Company, became its president. The new company began the manufacture and sale of shoes at Rochester, New York, and proceeded to use the trade-marks "Menihan" and "Arch Aid" in selling its product. By this suit the plaintiff seeks to prevent such use.

12 This is an attempt upon the part of the plaintiff to preserve the trade-marks and trade names in gross separate and apart from the good will of an existing business. In December 1936, when The Menihan Company filed its voluntary petition in bankruptcy, a receiver was appointed to take possession of the property of the bankrupt, to employ such help as might be necessary to preserve the assets, to collect the accounts receivable, and to look after the interests of creditors until a trustee would be appointed. The receiver was given no authority to conduct the business nor did he conduct the business. He sold some shoes which had been manufactured but otherwise did nothing to continue the business. Nor did the trustee continue the business. He proceeded forthwith upon his appointment to liquidate the assets.

The trustee conducted a public sale in March 1937. At the trustee's sale the plaintiff purchased the real estate, fixtures, furniture, machinery, and equipment, all trade-marks, together with the good will of the business of the bankrupt and such right as the bankrupt had to use the name "The Menihan Company" and the name "Arch Aid." Thereafter the plaintiff attempted unsuccessfully to sell the business intact. In September of 1937, immediately prior to the commencement of this action, the plaintiff advertised for sale at public auction the furniture, machinery, lasts, dies, patterns, and equipment which it had purchased at

13 the trustee's sale. The sale was had on October 5, 1937.

At that sale plaintiff disposed of to the public without restriction all the physical assets of the bankrupt excepting the factory building with overhead shafting. It made no attempt to sell the good will nor the trade-marks and trade names which it now claims to own and protection for which it seeks in this action.

The acts of the plaintiff itself were sufficient to destroy the business and good will. The product which the old company sought to have identified in the minds of the public by the name "Arch Aid" was a corrective shoe designed to aid weak, defective or abnormal feet as the trade-mark implies. The trade, if any, to which the plaintiff succeeded is the trade in that product and not in some other product. It is not the trade in ordinary shoes

nor in corrective shoes in general but in corrective shoes such as were designed and sold by the old company. In seeking protection for such trade the plaintiff's claim is that the public had come to know such corrective shoes as Menihan Arch Aid shoes. Everything that is necessary to the manufacture of that product is gone and as far as the proof shows, irrevocably so. The most essential elements, the lasts, dies, and patterns, were sold by the plaintiff itself who now seeks to have the trade protected. The plaintiff contends, however, that new lasts, dies, and patterns could be purchased upon resuming active manufacture of shoes. It is true that new implements could be secured for the manufacture of shoes but there is no proof that they could produce the product sold by the old company as Arch Aid shoes.

14 There is no proof that the plaintiff retained in connection with its claimed good will even the designs or measurements or enough to preserve the essential idea of the corrective features of Arch Aid shoes. No vestige of the old business remains except the factory building. The entire personnel of the old company is gone. The factory has long since been closed. The business has been discontinued. The elements necessary to create Arch Aid shoes are gone. What is left does not constitute a business to which good will, trade-marks, and trade names may attach.

A trade-mark is not susceptible of ownership except in connection with an existing business. It is a shield or protection for the good will of the business. If there is no business there may be no good will and nothing to protect by the use of a trade-mark. It is the trade and not the mark that is to be protected. *Hanover Milling Co. vs. Metcalf*, 240 U. S. 403, 414; *United Drug Company vs. Rectanus Co.*, 248 U. S. 90. "A trade-mark cannot exist independently of some business in which it is used. The sole function of a trade-mark being to indicate the origin or ownership of the goods, it cannot exist apart from the business to which it is incident. There is no such right known to the law as an exclusive ownership in a trade-mark apart from the right to use it in a business. It cannot exist in gross." *President Suspendor Co. vs. MacWilliam*, 238 Fed. 159, 161.

15 Plaintiff contends that prospective purchasers of the business and good will were dissuaded from purchasing by reason of the defendant's use of the trade-marks. The only evidence tending to establish this is the negotiations by the *Baris Shoe Company* and *L. V. Marks and Sons*. The former was a jobber in the shoe business. The letter of inquiry made no reference to the purchase of the business but related solely to the purchase of the trade-marks and trade name. A representative of the latter firm attended the auction sale at the time that the

plaintiff sold the machinery, equipment, furniture and fixtures. He made inquiry of the auctioneer about the trade names and subsequently wrote the plaintiff about the trade name "Menihan Arch Aid." No reference was made in the negotiations to the purchase of the business. In fact, this representative had seen with his own eyes the sale of the machinery and equipment and everything that was required to make the shoes.

Plaintiff relies on Koppell Industrial Car and Equipment Co. vs. Orenstein & Koppell, 289 Fed. 446. In that case the alien property custodian sold the American business and good will of the German corporation as a going concern. After such purchase the appellant entered upon the manufacture and carrying on of the American business. The court pointed out that the sale was as complete as if it were a voluntary conveyance. The court cited as authority for its decision Peck Brothers and Co. vs. Peck Brothers Co., 113 Fed. 291. In the latter case Peck

16 Brothers & Co. became financially embarrassed and a bill in equity was filed by the owners of a majority of the stock against the corporation for an appointment of a receiver. Receivers were appointed who took charge of the corporation and managed its business. Subsequently, another corporation was formed by one of the receivers and this corporation proceeded to use the trade name and to garner the business of Peck Brothers & Co. In that case the court said "The name and designation was a property right belonging to and a valuable asset of the original Connecticut corporation. Its financial embarrassment caused no suspension of its manufacture and trade. That was continued by the receivers appointed under the bill manifestly for the purposes of reorganization." In the Koppell case the court also cited S. F. Myers Co. vs. Tuttle, 183 Fed. 235, and approved the reason for the decision of the District Court in that case. In the latter case the court said "I think he was substantially the purchaser of the business as a going concern and he is entitled to carry on the business without interference—"

One of the defenses urged is that plaintiff by its acts abandoned its right to the use of the trade-marks and trade names. There was no abandonment in the strict sense of the term for abandonment presupposes the ownership of trade-marks and trade names which can only be in connection with an existing business. For that reason the cases regarding abandonment and the intention to abandon the use of trade-marks and trade names are inapplicable here. The plaintiff's acts amounted to  
17 more than abandonment. They amounted to the destruction of what was necessary to the existence of a business to which good will, trade-marks and trade names might attach.

But even considering abandonment in its broader sense, Beechnut Packing Co. vs. Lorillard, 273 U. S. 629, cited by plaintiff to sustain its contention that a trade-mark is not abandoned or destroyed as a matter of law merely through disuse, is distinguishable. In that case the Lorillard Company which claimed the right to use the trade-mark "Beechnut" on its tobacco continued at all times in the tobacco business. It merely suspended use of the trade-mark "Beechnut." In the case at bar not only the use of the trade-mark but the business itself was effectively discontinued.

Whether plaintiff relies for its rights to the exclusive use of the trade-mark "Arch Aid" on the mortgages, the assignment or the conveyance from the trustee in bankruptcy, it got no better or broader rights to such use than the old company had. It may be that the defendant, J. G. Menihan, Sr., is estopped from asserting that the trade-marks are invalid but that does not apply to the corporate defendant nor to J. G. Menihan, Jr. Neither of the latter had any part in negotiating the loans nor did they make any representations as to the validity of the trade-marks. The plaintiff contends that although the words "Arch Aid" are descriptive, that through long use and association with shoes made by the bankrupt company it had attained a secondary significance and meant to the public shoes made by the old company. I do not think the proof is sufficient

18 to establish such secondary meaning. It may be that the mark "Arch Aid" had that meaning in the minds of dealers familiar with the corrective shoes but the proof falls short of establishing that meaning in the minds of the public. The advertising that the company did along that line expressed only a desire on its part that "Arch Aid" would come to mean that.

If the plaintiff is right in its contention that "Arch Aid" had attained a secondary significance and meant to the public the line of corrective shoes sold by the old company, a determination by this court that the plaintiff has the exclusive right to the use of that mark would lead to a potential fraud in the hands of prospective purchasers of the mark. The public would then have a right to expect to get the same shoe under that name that it had bought from the old company. There is no proof that a purchaser of the trade-mark could deliver that product. In fact, the necessary inference from plaintiff's sale of everything that was necessary to create it is that a new user of the mark would have to substitute something else for the original.

The plaintiff has no trade as a basis upon which it may invoke the equity powers of this court to restrain acts of infringement

10 RECONSTRUCTION FINANCE CORP. VS. J. G. MENIHAN CORP.

and unfair competition. The bill of complaint should be dismissed. Settle findings, conclusions and a decree upon notice.

Dated July 31, 1939.

HAROLD P. BURKE,  
*United States District Judge.*

19 IN UNITED STATES DISTRICT COURT

Western District of New York

In Equity No. 2174

RECONSTRUCTION FINANCE CORPORATION, PLAINTIFF

vs.

J. G. MENIHAN CORP., J. G. MENIHAN, SR., and J. G. MENIHAN,  
JR., DEFENDANTS

Appearances: Harold G. Hutchens, for the Plaintiff. George H. Harris, for the Defendants.

*Decision by Burke, D. J.*

The defendants having prevailed on the trial of this action apply for costs and an additional allowance. The plaintiff is an agency of the Federal Government. Rule 54 (d) of the Rules of Civil Procedure provides that costs against the United States, its officers and agencies, shall be imposed only to the extent permitted by law. By the adoption of this rule costs against the United States, its officers and agencies were left unaffected. I find no provision of law permitting costs to be imposed against the Reconstruction Finance Corporation. I therefore hold that the defendants are not entitled to costs. (Federal Deposit Insurance Corporation vs. Cassidy, et al., Circuit Court of Appeals, 10th Circuit, decided September 25, 1939.)

Dated October 19, 1939.

HAROLD P. BURKE,  
*United States District Judge.*

20 Circuit Court of Appeals for the Tenth Circuit  
September 25, 1939

FEDERAL DEPOSIT INSURANCE CORPORATION

vs.

CASADY

On appeal from the District Court of the United States for the Western District of Oklahoma

Before PHILLIPS, BRATTON, and WILLIAMS, Circuit Judges;

WILLIAMS, C. J. The First State Bank of Cheyenne, Oklahoma, having become insolvent on March 25, 1935, it was closed and taken over by the Bank Commissioner of said state for liquidation. Deposits in said bank were insured by the Federal Deposit Insurance Company as limited by Section 12B (a), (y) of Act of June 16, 1933, 48 Stat. 168, 179, as amended by Act of June 16, 1934, 48 Stat. 969.

John C. Casady, as treasurer of the town of Cheyenne, carried five separate and distinct deposits in said bank, at all times designated and appearing on its books as separate deposits, \* \* \*

Said treasurer and other appropriate and necessary parties instituted this action in the District Court of Roger Mills County, Oklahoma, against the bank and the Insurance Corporation \* \* \*

21 The case was duly removed by the Insurance Corporation to the United States Court for the Western District of Oklahoma, the court ruling that it had thereby acquired jurisdiction. Judgment having been rendered in favor of the plaintiffs, the Insurance Corporation appealed.

The findings of fact as made by the trial court, the case being tried without the intervention of a jury, are supported by substantial evidence, and his conclusions of law are in conformity therewith.

Costs—The question is raised as to costs. Appellant being a governmental agency, costs should neither be awarded in its favor nor against it in this action, and the adjudication against the defendant as to costs is eliminated. Paragraph (d), Rule 54.

22 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

*Stipulation as to record*

It is hereby stipulated that the foregoing papers shall constitute the record on appeal herein and may be so certified.

Dated December 22, 1939.

WERNER, HARRIS & TEW,  
by GEORGE H. HARRIS,  
*Attorneys for Defendants-Appellants.*

ABBOTT, RIPPEY & HUTCHENS,  
by HAROLD G. HUTCHENS,  
*Attorneys for Plaintiff-Appellee.*

12 RECONSTRUCTION FINANCE CORP. VS. J. G. MENIHAN CORP.

23 [Clerk's certificate to foregoing transcript omitted in printing.]

32 Supreme Court of the United States

*Order allowing certiorari*

Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] Enter Attorney General. File No. 44549. U. S. Circuit Court of Appeals, Second Circuit. Term No. 200. Reconstruction Finance Corporation, Petitioner vs. J. G. Menihan Corp., J. G. Menihan, Sr., and J. G. Menihan, Jr. Petition for writ of certiorari and exhibit thereto. Filed July 2, 1940. Term No. 200 O. T. 1940.

**UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT**

**J. G. MENIHAN CORP., J. G. MENIHAN, SR., AND J. G. MENIHAN, JR.,  
DEFENDANTS-APPELLANTS**

**RECONSTRUCTION FINANCE CORPORATION, PLAINTIFF-APPELLEE**

Upon reading and filing the annexed stipulation, dated January 9, 1940, it is on motion of Abbott, Rippey and Hutchens, ordered, that Effingham Evarts, be and he hereby is substituted as Attorney for plaintiff-appellee, without prejudice to the proceedings heretofore had herein.

Dated New York, New York, January 15, 1940.

*D. E. ROBERTS, Clerk.*

**United States Circuit Court of Appeals for the Second Circuit**

**J. G. MENIHAN CORP., J. G. MENIHAN, SR., AND J. G. MENIHAN, JR.,  
DEFENDANTS-APPELLANTS**

**RECONSTRUCTION FINANCE CORPORATION, PLAINTIFF-APPELLEE**

It is hereby stipulated, consented, and agreed, that Effingham Evarts, of 33 Liberty Street, New York City, New York, be and he hereby is substituted as Attorney for plaintiff-appellee in the above-entitled action; that an order to this effect may be entered by any party without notice.

Dated January 9, 1940.

**ABBOTT, RIPPEY & HUTCHENS,  
Abbott, Rippey Hutchens,  
Attorneys for Plaintiff-Appellee.**

**RECONSTRUCTION FINANCE CORPORATION,  
By THOMAS E. PARKS,  
Attorney-in-Fact, Plaintiff-Appellee.  
EFFINGHAM EVARTS,  
Attorney to be substituted.**

**STATE OF NEW YORK,**

*County of New York, ss:*

On this 15th day of January 1940, before me personally came Thomas E. Parks, to me known and known to me to be the person described in and who executed the foregoing instrument as attorney-in-fact for Reconstruction Finance Corporation and he acknowledged to me that, as such attorney-in-fact, acting under and by virtue of a power of attorney duly executed by and under the corporate seal of Reconstruc-

tion Finance Corporation dated the 18th day of December 1939, he executed the foregoing instrument as the act and deed of Reconstruction Finance Corporation for the purposes therein mentioned.

SOL A. LIEBMAN,  
Sol A. Liebman,  
*Notary Public, Kings County.*

Kings Co. Cl'k No. 135 Reg. No. 263. N. Y. Co. Cl'k No. 596 Reg. No. 0L30. Bronx Co. Cl'k No. 40 Reg. No. 149L4. Queens Co. Cl'k No. 822. Reg. No. 3244. Term expires March 30, 1940.

United States Circuit Court of Appeals for the Second Circuit

No. 252—October Term, 1939

(Argued March 8, 1940. Decided May 13, 1940)

RECONSTRUCTION FINANCE CORPORATION, PLAINTIFF-APPELLEE

vs.

J. G. MENIHAN CORP., J. G. MENIHAN, SR., AND J. G. MENIHAN, JR.,  
DEFENDANTS-APPELLANTS

Appeal from the District Court of the United States for the Western  
District of New York

Suit in equity by Reconstruction Finance Corporation to enjoin trade-mark infringement and unfair competition. After trial the complaint was dismissed without costs on the ground that the imposition of costs against the plaintiff, a governmental agency, is not permitted by law. From so much of the final decree as denied them costs, the defendants appeal. They also appeal from a prior order denying, for the same reason, their application for an additional allowance. Reversed and remanded.

Before: SWAN, CLARK, and PATTERSON, Circuit Judges;  
Werner, Harris, and Tew, Solicitors for Appellants; Hugh J. O'Brien, of Counsel.

Effingham Evarts, Solicitor for Appellee; C. J. Durr, Assistant General Counsel, Hans A. Klagsbrunn, Counsel, and Sol A. Liebman, of Counsel.

SWAN, Circuit Judge;

This appeal is before us upon a record made up pursuant to Rule 76 of the Rules of Civil Practice. The question presented is whether the trial court erred in dismissing the complaint without costs and in denying the defendants' application for an additional allowance on the theory, stated in the court's opinion, 29 F. Supp. 853, that no provision of law permits the imposition of costs against the Reconstruction Finance Corporation.

In equity and in admiralty the imposition of costs is so largely a matter within the discretion of the trial court that a decree relating to costs alone will not ordinarily be reviewed by an appellate court.

Canter v. Insurance Companies, 3 Pet. 307, 319; Du Bois v. Kirk, 158 U. S. 58, 67; Wingert v. First Nat. Bank, 223 U. S. 670, 672. But the rules does not apply when, as in the case at bar, the power of the court, and not merely the exercise of its discretion, is the controverted question. Newton v. Consolidated Gas Co., 265 U. S. 78, 83; United States v. Knowles' Estate, 58 F. 2d 718 (C. C. A. 9); Stallo v. Wagner, 245 F. 636 (C. C. A. 2); In re Michigan Central R. Co., 124 F. 727 (C. C. A. 6).

Reconstruction Finance Corporation is a corporation created by the act of January 22, 1932, for the purpose of providing emergency financing facilities in the interest of agriculture, commerce and industry. 47 Stat. 5; see also 47 Stat. 709; 48 Stat. 1108. Its capital stock is owned by the United States and its affairs are managed by a board of directors consisting of three ex officio members and four other persons appointed by the President of the United States by and with the consent of the Senate. Beyond doubt it is a governmental agency for which the corporate form was adopted for administrative convenience. Baltimore Nat. Bank v. Tax Commission, 297 U. S. 209, 211; Langer v. United States, 76 F. 2d 817, 823 (C. C. A. 8). Section 4 of the act creating the corporation gives it power "to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State, or Federal." 47 Stat. 6. The present suit was brought to enforce supposed property rights in certain trade-marks which the plaintiff had acquired under a bankruptcy sale of the previous corporate owner to which the plaintiff had made a loan. On the merits the case went against the plaintiff. 28 F. Supp. 920. Were it an ordinary private corporation costs would undoubtedly have been awarded to the successful defendants.

Rule 54 (d) of the Rules of Civil Procedure reads as follows:

"(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. \* \* \*

This rule is merely declaratory of existing law with respect to the imposition of costs against governmental agencies. There is no statutory provision expressly permitting the taxation of costs against the appellee. Hence the appellants must find an implied permission if they are to prevail.

It is well settled that when the United States is a litigant, whether suitor or defendant, costs are not taxable against it in the absence of direct statutory authorization. United States v. Chemical Foundation, 272 U. S. 1, 20; United States v. Worley, 281 U. S. 339, 344; The Glymont, 66 F. 2d 617, 619 (C. C. A. 2); United States v. Knowles' Estate, 58 F. 2d 718 (C. C. A. 9). But these cases are not necessarily controlling when special governmental activities are conducted through the medium of a corporate instrumentality endowed with many of the attributes of a private corporation, including the power to sue and the

liability to be sued. As Mr. Justice Frankfurter remarked in *Keifer & Keifer v. R. F. C.*, 306 U. S. 381, at 388, "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." There the question was whether a Regional Agricultural Credit Corporation was suable. Its charter was silent on the subject. The problem was stated by the court at page 399:

"Congress may, of course, endow a governmental corporation with the government's immunity. But always the question is: has it done so?"

The opinion then went on to show the recent trend of congressional policy and to hold the legal position of Regional Agricultural Credit Corporation in respect to suability to be the same as though Congress had expressly empowered it to sue and be sued. Other recent cases in the Supreme Court also indicate that when authority is given to sue a governmental corporation it is to be liberally construed. See *Continental Bank v. Rock Island Ry.*, 294 U. S. 648, 684; *United States v. Shaw*, 8 U. S. L. W. 533, 534; *Federal Housing Administration v. Burr*, 8 U. S. L. W. 285. In the case last cited the Housing Administration claimed immunity from garnishment. In denying this claim the opinion of Mr. Justice Douglas (p. 286) states that, in the absence of reasons to the contrary, "it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued', that agency is not less amenable to judicial process than a private enterprise under like circumstances would be." It was also held that, although the federal statute was silent on the subject, execution under the judgment was part of the civil process embraced in the "sue and be sued" clause and might be issued against funds in possession of the Housing Administration, though not against funds or property of the United States. In the light of these decisions we are led to the conclusion that in conferring upon the appellee the power to sue and be sued, Congress intended to subject it to the ordinary incidents of a suit, one of which is the imposition of costs against an unsuccessful litigant. If the rendition of a judgment against the Reconstruction Finance Corporation, implicit in permitting it to be sued, is not an interference with its governmental activities, we can see no reason for supposing that immunity was granted with respect to the small additional sum that would normally be added to the judgment as costs.

Further indication that a wholly owned governmental corporation is to be treated as a private corporation when the problem is one of suability is to be found in *Sloan Shipyards v. U. S. Fleet Corp.*, 258 U. S. 549. At page 567, Mr. Justice Holmes stated that where a governmental instrumentality is incorporated "you have a person, and as a person one that is presumably subject to the general rules of law." Another case looking in the same direction is *Missouri Pacific R. Co. v. Ault*, 256 U. S. 554. There, although the clause allowing suit against the Director General of Railroads was not the usual "sue and be sued"

clause, and seemed in terms to embrace all kinds of liability, it was held not to sanction the recovery of penalties, but to include interest and costs as part of the usual compensatory damages.

The appellee cites *National Home v. Wood*, 81 F. 2d 963 (C. C. A. 7) and *Federal Deposit Ins. Co. v. Casady*, 106 F. 2d 784 (C. C. A. 10), as opposed to the conclusion we have reached. The first is readily distinguishable by reason of the statute involved, 38 U. S. C. A. § 11.(d). See 299 U. S. 211, 212n. With the second we must respectfully disagree if the legal position of the Federal Deposit Insurance Company is the same as that of Reconstruction Finance Corporation in respect to costs.

In our opinion the district court had power to allow costs to the defendants on dismissal of the complaint, and they are to be allowed as of course unless the district court otherwise directs. We think it was also within the power of the trial court, at his discretion, to grant the motion for an additional allowance. We express no opinion as to how his discretion should be exercised; we are concerned only with the question of his power. The order denying the motion is reversed in order that the district court may entertain the application for an additional allowance in the light of the appropriate equitable considerations. *Sprague v. Ticonic Bank*, 307 U. S. 161.

The cause is remanded in order that the district court may exercise his discretion both as to normal costs and as to the motion for an additional allowance. The appellants are awarded appellate costs.

CLARK, Circuit Judge (dissenting).

Though Judge Swan's opinion is persuasive indeed, I think it results in an order for the payment of government funds to private persons without authorization of law. Even as between private litigants, costs, at least in an equity suit, are not a matter of right to a litigant, but are purely at the discretion of the court. *Gold Dust Corp. v. Hoffenberg*, 2 Cir., 87 F. 2d 451, 453; *Ex parte Peterson*, 253 U. S. 300, 317; *Payne*, Costs in Common Law Actions in the Federal Courts, 21 Va. L. Rev. 397, 399. And costs are never awarded against the United States except where there is direct statutory authority going beyond mere permission to bring suit. The opinion cites examples of the many precedents. See also 8 Ann. Cas. 398; 21 Va. L. Rev. 416; 28 U. S. C. A. §§ 548, 555; Rule 32.5 of the Supreme Court, and Rule 29.4 of this Court; and compare *Guaranty Trust Co. v. United States*, 304 U. S. 126; 134n.; *Globe & Rutgers Fire Ins. Co. v. United States*, 2 Cir., 105 F. 2d 160, 165, 167; 28 U. S. C. A. §§ 258, 270.<sup>1</sup>

This immunity would appear to apply to a governmental corporation, exercising governmental functions in place of the national gov-

<sup>1</sup> The history of 28 U. S. C. A. § 870 seems to me instructive because of what the statute does not say. That section originally provided that no bond on appeal should be required of the United States or a party acting by its direction, but in case of adverse decision "such costs as by law are taxable against the United States" or the party acting for it should be paid out of the contingent fund of the department under whose directions the proceedings were instituted. This statute was held to deal only with costs on appeal, which, however, were subject to the rules of court above cited. *Treat v. Farmers' Loan & Trust Co.*, 2 Cir., 185 F. 760. In 1934, it was amended to include specifically governmental corporations, 48 Stat. 1109; it has been held to apply to the appellee here. In *re New York Investors*, 2 Cir., 79 F. 2d 179, certiorari denied 296 U. S. 649.

ernment itself, just as much as does tax immunity. Cf. *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 477. And if any corporation is to be exempt, certainly the Reconstruction Finance Corporation must be included in the list, for it has been made the direct loaning authority of the United States, a conduit from the United States Treasury for the supplying of financial assistance for the rehabilitation of industry and commerce, threatened with prostration as a result of the great depression. *Baltimore National Bank v. State Tax Commission*, 297 U. S. 209, 211; *Langer v. United States*, 8 Cir., 76 F. 2d 817, 823; *United States v. Lewis*, D. C. W. D. Ky., 10 F. Supp. 471; cf. *State Tax Commission v. Van Cott*, 306 U. S. 511, 515.

Outside of the decision below, D. C. W. D. N. Y., 29 F. Supp. 853, the only precedents dealing directly with costs against governmental corporations are those denying any award. *National Home v. Wood*, 7 Cir., 81 F. 2d 963, affirmed 299 U. S. 211; <sup>2</sup> *Federal Deposit Ins. Corp. v. Barton*, 10 Cir., 106 F. 2d 737; *Federal Deposit Ins. Corp. v. Casady*, 10 Cir., 106 F. 2d 784. These are governmental corporations, which are, if anything, less engaged in exercising functions of sovereignty than is appellee here. Recent cases in the Supreme Court, referred to in the opinion, show the care and caution with which that Court has proceeded in discovering a legislative intent for even suability of particular corporations. Thus, *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784, and *Federal Housing Administration, Region No. 4 v. Burr*, 60 S. Ct. 488, allowed suits in situations which do not appear to be an extension of previous conceptions.<sup>3</sup> The theory of governmental immunity is restated and applied in the latest decision. *United States v. Shaw*, 60 S. Ct. —.<sup>4</sup>

As the opinion states, complete immunity for the government has been properly criticized, and reforms have been advocated relieving the citizen of manifest disadvantage from injury by the state. Compare Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform*, 20 A. B. A. J. 747, with bibliography; and *United States v. Petroleum Nav. Co.*, 2 Cir., 109 F. 2d 699. But all sugges-

<sup>2</sup> The force of this precedent does not seem to me destroyed because the statute 38 U. S. C. A. § 11d authorizes suits in the district courts and court of claims "according to the ordinary provisions of law governing actions against the United States, and such courts shall have the power to enter judgment against the United States, with interest, in the same manner and to the same extent as if said corporation were a party defendant." This language affords a narrow basis for according this corporation alone an immunity from costs; rather does it suggest that Congress did not think of a judgment against the United States as differing in "manner" and "extent" from one against a corporation of this nature.

<sup>3</sup> In the *Keifer* case, supra, the court held the Regional Agricultural Credit Corporation, the child of the Reconstruction Finance Corporation which is subject to suit, liable for negligent care as a bailee of livestock, a wrong not "disassociated from carrying out the very transaction which brought it into existence." In the *Burr* case, supra, suit by the garnishee process was held to be within the statutory authority to be sued; the Court carefully pointed out, however, that if the Administration had no funds they could not be obtained from the Treasurer of the United States by any process and hence execution in the action might prove futile.

<sup>4</sup> Compare the statement of Mr. Justice Reed: "• • • The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impenetrable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants. A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. • • • It is not our right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress."

tions for legislative reform have recognized the need of limitation and have provided careful restrictions on governmental responsibility, in order to prevent indiscriminate raids on the public treasury. Although costs have been said to be an "anachronism" in modern litigation (R. H. Smith, 3 J. Am. Jud. Soc. 112, 115), a policy favoring the award of reasonable costs against the government in the discretion of the court might well be supported before Congress. Even so, it seems rather doubtful whether a case such as the present one should be included. Here appellee loaned money to The Menihan Corporation, when the latter was in financial distress and on the security of its corporate name and special trade-marks. Upon insolvency of The Menihan Corporation, appellee was unable to collect its loan. In this action it was held powerless to prevent a new corporation, J. G. Menihan Corporation, from making use of the similar corporate name and the same trade-marks, and relief was also denied against J. G. Menihan, Sr., president of both corporations. D. C. W. D. N. Y., 28 F. Supp. 920. In the light of such a decision, however necessary it may be, the adoption here of what is really a new policy seems hardly appropriate. Carried to the extent of supporting an award of counsel fees—"almost uniformly" not granted even in equity, *Gold Dust Corp. v. Hoffenberg*, supra—when legal authority is so doubtful and the equities so opposed, the step, in my judgment, is quite undesirable.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of May, one thousand nine hundred and forty.

Present: HON. THOMAS W. SWAN, HON. CHARLES E. CLARK, HON. ROBERT P. PATTERSON, Circuit Judges.

RECONSTRUCTION FINANCE CORPORATION, PLAINTIFF-APPELLEE.

vs.

J. G. MENIHAN CORP., ET AL., DEFENDANTS-APPELLANTS

Appeal from the District Court of the United States for the Western District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with costs of this court to the appellants, and cause remanded for further proceedings in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS, Clerk.

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Order for Mandate. United States Circuit Court of Appeals, Second Circuit. May 23, 1940. D. E. Roberts, Clerk.

United States of America, Southern District of New York

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 33, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Reconstruction Finance Corporation, Plaintiff-Appellee, against J. G. Menihan Corp., et al., Defendants-Appellants, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twenty-third day of May, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fourth.

[SEAL]

D. E. ROBERTS, Clerk.

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1940

No. —

RECONSTRUCTION FINANCE CORPORATION, PETITIONER

v.

J. G. MENIHAN CORP., J. G. MENIHAN, SR., AND J. G.  
MENIHAN, JR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT

The Reconstruction Finance Corporation (hereinafter referred to as "RFC") prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on May 23, 1940, which reversed certain orders of the District Court denying respondents' request for the taxation of court costs and the allowance of attorney's fees against petitioner.

## **OPINIONS BELOW**

The opinion of the District Court (R. 19) is reported in 29 F. Supp. 853. The opinions of the Circuit Court of Appeals (R. 25-30) are not yet reported.

**JURISDICTION**

The decree of the Circuit Court of Appeals was entered on May 23, 1940 (R. 30). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTION PRESENTED**

May court costs and an allowance for attorney's fees be taxed against petitioner, a corporate instrumentality of the United States?<sup>1</sup>

**STATUTE AND RULE INVOLVED**

Section 4 of the Reconstruction Finance Corporation Act, c. 8, 47 Stat. 6; U. S. C., Title 15, Sec. 604, provides in part:

The corporation \* \* \* shall have \* \* \* power \* \* \* to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal \* \* \*.

Rule 54 (d) of the Federal Rules of Civil Procedure provides:

Costs: Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs;

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<sup>1</sup> In its order, the Circuit Court of Appeals also taxed costs in that court against petitioner (R. 30), and, in the argument on the merits, petitioner will urge as part of the question presented that such costs were likewise improperly taxed.

but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

#### STATEMENT

Pursuant to the provisions of Section 5d of the Reconstruction Finance Corporation Act, as amended, petitioner made a loan to the J. G. Menihan Corp. upon the security of certain collateral, which included trade-marks owned by the company (R. 11). Upon the bankruptcy of the company, petitioner acquired title to the collateral at a trustee's sale (R. 11-12), and thereafter brought proceedings to enjoin respondents from trade-mark infringement and unfair competition (R. 6-7).

After trial, the District Court dismissed petitioner's bill on the merits (R. 4-5). However, it refused to tax court costs against petitioner (R. 4-5) and denied respondents' application for an additional allowance for attorney's fees (R. 5-6, 30), on the ground that "the imposition of costs against the plaintiff, a governmental agency, is not permitted by law" (R. 5-6, 19).

Respondents thereupon appealed to the Court below from so much of the orders of the District Court as denied their applications for costs and for an additional allowance for attorney's fees (R. 2-3). The court below (Clark J., dissenting) held

that the District Court had power to tax costs and additional allowances against petitioner, and reversed the orders of the District Court appealed from (R. 25-30).

#### **SPECIFICATION OF ERRORS TO BE URGED**

The court below erred:

1. In holding that court costs and additional allowances may be taxed against petitioner.
2. In taxing costs in that court against petitioner.
3. In reversing the orders of the District Court appealed from.

#### **REASONS FOR GRANTING THE WRIT**

1. The decision of the court below is in direct conflict with the decision of the United States Circuit Court of Appeals for the Tenth Circuit in *Federal Deposit Insurance Corporation v. Casady*, 106 F. (2d) 784. In that case, the court reversed an order of the District Court allowing costs to be taxed against the Federal Deposit Insurance Corporation, which, like RFC, is a corporate instrumentality of the United States devoted exclusively to the purposes of the United States. The ground of decision was that "being a governmental agency, costs should neither be awarded in its favor nor against it" (p. 792). The same ruling was made by that court without discussion in *Federal Deposit Insurance Corporation v. Barton*, 106 F. (2d) 737.

The statutory provision authorizing suits by and against the Federal Deposit Insurance Corporation<sup>2</sup> is substantially identical to the RFC provision.

Both the majority and dissenting opinions below recognize the existence of the conflict with the Tenth Circuit (R. 28, 29).

The decision of the court below is also in substantial conflict with the United States Circuit Court of Appeals for the Seventh Circuit in *National Home v. Wood*, 81 F. (2d) 963, affirmed on other issues in 299 U. S. 211, 212n. In an action against the National Home for Disabled Volunteer Soldiers, after the transfer of its property to the United States, the court held that costs may not be taxed against it. The statute provided that suits on obligations of the Home may be brought in the District Courts and the Court of Claims "according to the ordinary provisions of law governing actions against the United States, and such courts shall have the power to enter judgment against the United States, with interest, in the same manner and to the same extent as if said cor-

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<sup>2</sup> Section 101 of the Banking Act of 1935, c. 614, 49 Stat. 684, 692, amends Section 12B of the Federal Reserve Act by adding, *inter alia*, subdivision (j) which empowers the Federal Deposit Insurance Corporation—

"To sue and be sued, complain and defend, in any court of law or equity, State or Federal." (U. S. C., Title 12, Sec. 264 (j).)

poration were party defendant": Sec. 5 (b) of Act of July 3, 1930, c. 863, 46 Stat. 1017.

2. The question here presented recurs frequently in the widespread litigation carried on by the large number of governmental instrumentalities empowered to sue and be sued.<sup>4</sup> It is generally disposed of in the orders of the District Courts without opinion, and, in view of the decision of the court below and of the *Casady* and *Wood* cases, there is little likelihood that, without an authoritative determination, the practice of the District Courts will be uniform.

#### CONCLUSION

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

✓ FRANCIS BIDDLE,

*Solicitor General.*

CLAUDE E. HAMILTON, Jr.,

*General Counsel,*

*Reconstruction Finance Corporation.*

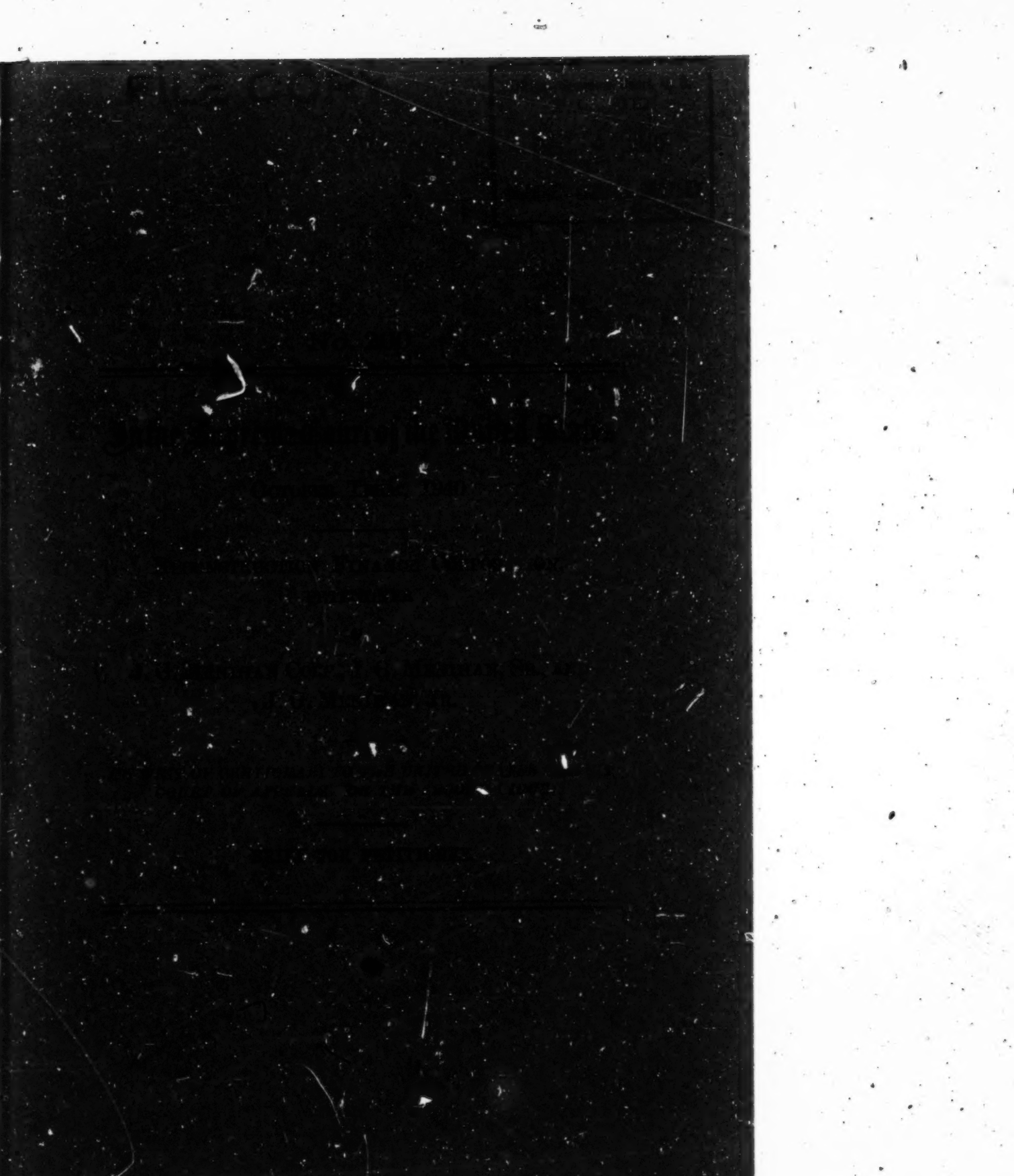
JULY 1940.

<sup>3</sup> The sue-and-be-sued clause relating to the National Home, prior to the transfer of its property to the United States, did not differ substantially from the RFC clause and provided (R. S. Sec. 4825) that it shall have power "to sue and be sued in courts of law and equity."

<sup>4</sup> A list of forty of such corporate instrumentalities is contained in the opinion of this Court in *Keifer & Keifer v. RFC & R. A. C. C.*, 306 U. S. 381, 390-391n.

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1940**

**No. 200**

**RECONSTRUCTION FINANCE CORPORATION,  
PETITIONER**

**v.**

**J. G. MENIHAN CORP., J. G. MENIHAN, SR.,  
AND J. G. MENIHAN, JR.,**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF FOR PETITIONER**

**OPINIONS BELOW**

The opinion of the District Court (R. 5-10) is reported in 29 F. Supp. 853. The majority opinion of the Circuit Court of Appeals (R. 14-17), and the dissenting opinion of Judge Clark (R. 17-19), are reported in 111 F. (2d) 940.

**JURISDICTION**

The decree of the Circuit Court of Appeals was entered on May 23, 1940 (R. 19). The petition for a writ of certiorari was granted on October 14,

1940. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

May respondents have court costs and an allowance, apparently for attorney's fees, taxed against Reconstruction Finance Corporation, a corporate instrumentality of the United States?

#### STATUTES INVOLVED

Section 4 of the Reconstruction Finance Corporation Act, c. 8, 47 Stat. 6; U.S. C., Title 15, Sec. 604, provides in part:

The corporation \* \* \* shall have  
\* \* \* power \* \* \* to sue and be  
sued, to complain and to defend, in any court  
of competent jurisdiction, State or Federal  
\* \* \*

A pamphlet of laws entitled "Reconstruction Finance Corporation Act, as Amended, and Other Laws and Documents Pertaining to Reconstruction Finance Corporation, October 1939 (Revised)," is filed with this brief.

#### STATEMENT

Pursuant to the provisions of Section 5d of the Reconstruction Finance Corporation Act, as amended, Reconstruction Finance Corporation (hereinafter called RFC) in 1934 made a loan to the Menihan Company upon the security of certain collateral, which included trade-marks owned by

the company (R. 5). Upon the bankruptcy of the company in December 1936, RFC acquired title to the collateral at a trustee's sale (R. 5-6). Thereafter RFC brought proceedings to enjoin J. G. Menihan Corp., which was formed in January 1937, J. G. Menihan, Sr., who had been president of the Menihan Company and became president of the respondent corporation upon its formation, and J. G. Menihan, Jr., from trade-mark infringement and unfair competition (R. 3, 5-6).

After trial the District Court dismissed RFC's bill on the merits (R. 2-3, 4). However, it refused to tax court costs against RFC (R. 2-3, 4) and denied respondent's application for an additional allowance (apparently for attorney's fees<sup>1</sup>) (R. 3, 4, 19), on the ground that "the imposition of costs against the plaintiff, a governmental agency, is not permitted by law" (R. 2-3, 4, 10).

Respondents thereupon appealed to the Circuit Court of Appeals from so much of the orders of the District Court as denied their application for costs and for an additional allowance (R. 1-2, 4). The court below (Clark, J., dissenting) held that the District Court had power to tax costs and additional allowances against RFC, and reversed the orders of the District Court appealed from (R. 14-

<sup>1</sup> The record does not specifically show that the additional allowance sought was for attorney's fees. But, in his dissenting opinion, Judge Clark states that to be the fact (R. 19).

19). The Circuit Court of Appeals also taxed costs in that court against RFC (R. 17, 19).

#### SPECIFICATIONS OF ERRORS TO BE URGED

The court below erred:

1. In holding that court costs and additional allowances may be taxed against RFC.
2. In taxing costs in that court against RFC.
3. In reversing the orders of the District Court appealed from.

#### SUMMARY OF ARGUMENT

The power of the inferior federal courts to allow and tax costs rests, so this Court has stated, "upon usage long continued and confirmed by implication from provisions in many statutes." *Ex parte Peterson*, 253 U. S. 300, 316; *Sprague v. Ticonic Bank*, 307 U. S. 161, 164-166. Yet this usage under a settled line of decisions does not authorize the taxation of such costs against the Government. Rather, in the absence of a specific waiver of its traditional immunity from such costs, supplementing its consent to suit, the implication is plain that Congress intends that such costs may not be taxed against the Government.

This settled construction of acts of Congress consenting to suit against the Government is equally applicable to the Act authorizing RFC "to sue and be sued" in any court of competent jurisdiction. An examination of the powers, duties, and responsibilities of RFC discloses that they are of the type

traditionally associated with Government. In a real sense the activities of RFC are the activities of the United States. The choice of a corporate form of agency to carry out the ends of Government may, it is true, be indicative of an intention that RFC shall be amenable to the judicial process as are other governmental agencies in corporate form. Yet, this is not to solve the problem here, but merely to state it. The motives which induce Government to carry on its activities through a corporate form are not relevant to the problem raised in this case. And the climate of dominant opinion, together with the adjudicated cases, concerning the taxation of court costs against Government corporations, tend to support our position, insofar as they look in any direction. In these circumstances, therefore, the character of the functions performed by RFC would appear to be the determining factor. It is just such evidence as this Court recognizes in other legal relations "when realities become decisive." *Inland Water Ways Corp. v. Young*, 309 U. S. 517, 523-524; *Clallam County v. United States*, 263 U. S. 341; *Emergency Fleet Corp. v. Western Union*, 275 U. S. 415. The closest analogy which Congress might be thought to have in mind when it created RFC, and authorized it "to sue and be sued," is the group of statutes consenting, without more, to suits against the Government. It follows that RFC should not be taxed with court costs.

And, in any event, the additional allowances, apparently for attorneys' fees, should not have been charged against RFC. These are in the nature of penalties and are plainly not to be laid against a Government corporation.

#### ARGUMENT

The issue in this case is narrow: whether RFC may be held liable for court costs and for attorney allowances.— The United States by long and settled tradition is immune from this liability and the question here is simply whether Congress in creating RFC stripped it of this immunity. This, of course, is simply a question of the intent of Congress.

Congress has not in terms specified the applicable rule. The problem before the Court, therefore, would seem to be answered in terms of the rule as to costs which Congress thought would be applicable in its silence.

#### A. AUTHORITY OF THE COURTS TO ENTERTAIN A SUIT, IN THE ABSENCE OF A SPECIFIC STATUTORY WAIVER OF IMMUNITY FROM COURT COSTS, DOES NOT COMPREHEND THE AUTHORITY TO TAX SUCH COSTS AGAINST THE GOVERNMENT

The power of the inferior<sup>2</sup> federal courts to allow and tax court costs appears not to have been conferred directly, but only recognized by implica-

<sup>2</sup> Rule 32 (f) of this Court, 306 U. S. 711, reads: "No costs shall be allowed in this Court either for or against the United States or an officer or agency thereof, except where specially authorized by statute and directed by the court."

tion, in the First Judiciary Act. Act of September 24, 1789, 1 Stat. 83. It rests, so this Court has said, upon "usage long continued and confirmed by implication from provisions in many statutes." *Ex parte Peterson*, 253 U. S. 300, 315-319; *Sprague v. Ticonic Bank*, 307 U. S. 161, 164-166. Yet this usage under a settled line of decisions does not permit the rendition of a judgment or decree for such costs against the United States, whether appearing as plaintiff<sup>3</sup> or as defendant. E. g., *United States v. Worley*, 281 U. S. 339, 344; *United States v. Chemical Foundation*, 272 U. S. 1, 20-21; *Pine River Logging Co. v. United States*, 186 U. S. 279, 296. As early as 1817 Chief Justice Marshall observed that "the United States never pay costs." *United States v. Barker*, 2 Wheat. 395. See also *United States v. LaVengeance*, 3 Dall. 297; *United States v. Hooe*, 3 Cranch 73; *United States v. Ringgold*, 8 Pet. 150.

<sup>3</sup> There is no exception to the rule of immunity where the United States, as plaintiff, sues a citizen in its own courts. A possible ambiguity on this score, arising from the decision in *United States v. The Thekla*, 266 U. S. 328, 339-340, 341, has been set at rest by subsequent decisions of this Court. *The Thekla* turns upon a doctrine applicable only to suits in admiralty for damages arising from collision. See *United States v. Shaw*, 309 U. S. 495, 502-503; *Guaranty Trust Co. v. United States*, 304 U. S. 126, 134n. On several occasions this Court has denied that the inferior courts have power to enter a judgment for court costs against the United States in suits brought by the United States as plaintiff. E. g., *United States v. Chemical Foundation*, 272 U. S. 1, 20-21; *United States v. Boyd*, 5 How. 29, 50; *United States v. Hooe*, 3 Cranch 73, 92.

The rule, of course, is susceptible of statutory qualification. Congress has in some circumstances specifically authorized an allowance for the costs of suit to be included in a decree against the United States.<sup>4</sup> But only Congress has power to waive or qualify the Government's immunity. And this waiver of the Government's immunity must be accomplished by specific direction of Congress. As this Court ruled in *United States v. Chemical Foundation, supra*, 20-21:

The general rule is that, in the absence of a statute directly authorizing it, courts will not give judgment against the United States for costs or expenses. \* \* \* Congress alone has power to waive or qualify that immunity.

Accordingly, in the absence of specific statutory authority, there is no doubt that a judgment for costs against the United States is beyond the power of the inferior federal courts. *United States v. Worley, supra*, at 339; *United States v. Chemical*

<sup>4</sup> E. g., Act of March 9, 1920, 41 Stat. 525, 46 U. S. C. § 743: "A decree against the United States or such corporation may include costs of suit," *James Shewan & Sons, Inc., v. United States*, 267 U. S. 86, 87; Judicial Code § 152, 28 U. S. C. § 258: "If the Government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue," *United States v. Harmon*, 147 U. S. 268; *United States v. Cress*, 243 U. S. 316; *Oregon & Cal. R. R. Co. v. United States*, 243 U. S. 550, 562. See also Revised Statutes § 989, 28 U. S. C. § 842. Compare Act of June 19, 1934, 48 Stat. 1004.

*Foundatton, supra*, at 20-21; *Pine River Logging Co. v. United States, supra*, at 296; *Stanley v. Schwalby*, 162 U. S. 255, 272; *United States v. Boyd*, 5 How. 29, 50; *The Antelope*, 12 Wheat. 546, 548.<sup>5</sup>

Each case laying down this rule governing the taxation of court costs, it is to be observed, was itself decided in the light of an express statutory authority to bring an action against the United States in a court of competent jurisdiction. It follows, under the practical construction accorded to acts of Congress for over a century, that action by Congress waiving immunity and consenting to suit does not give rise to an inference that costs may be taxed against the Government. Where Congress intends to permit the taxation of costs against the Government it must speak in no uncertain terms. See *James Shewan & Sons, Inc. v. United States, supra*, at 87; *Carlile v. Cooper*,

<sup>5</sup> The origin of the rule that the Government is immune from court costs is not entirely clear. It has been recognized as having its source in the prerogative of the sovereign. *United States v. Davis*, 54 Fed. 147, 153 (C. C. A. 8th); *Marine v. Lyon*, 62 Fed. 153, 154-155 (C. C. A. 4th). And court costs have generally been characterized as a substantive liability, similar to taxes, that may be incurred by the United States only where its immunity is specifically waived. E. g., *United States v. French Sardine Co.*, 80 F. (2d) 325, 326 (C. C. A. 9th); *Marine v. Lyon, supra*, at 154-155; *Erwin v. United States*, 37 Fed. 470, 488 (D. C.); *Fargo v. Helmer*, 43 Hun. (N. Y.) 17, 19. Compare *Clallam County v. United States*, 263 U. S. 341, 345. The United States, even though not taxable with costs, may be allowed costs. *Pine River Logging Co. v. United States*, 186 U. S. 279, 296.

64 Fed. 472, 475 (C. C. A. 2d). In the absence, therefore, of a specific waiver of its immunity from costs, supplementing its waiver of immunity from suit, it is clear that Congress intends that no judgment against the Government for court costs shall be rendered.\*

B. RFC IS A BRANCH OF THE UNITED STATES  
GOVERNMENT

1. We do not, of course, urge that every corporation created by Congress enjoys the immunity from court costs retained by the United States when it authorizes suits against itself. For, as this Court has recognized, there is a marked distinction between "the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account" and the case of a corporation which acts as a part of the Government, and exists in corporate form "only for the convenience of the United States to carry out its ends." *Clallam County v. United States*, 263 U. S. 341, 345. The purposes and function it performs, or its legislative history, may well indicate that such a federally chartered corporation designed to serve in part private or nongov-

\* Rule 54 (d) of the Rules of Civil Procedure, 308 U. S. 732-733, whatever its other effects on equity practice as to costs, plainly does not modify the existing practice as to the imposition of costs against the United States, its officers, and agencies. Notes of the Advisory Committee; Act of June 19, 1934, c. 651, §§ 1, 2, 48 Stat. 1064.

ernmental ends' was intended to be as completely amenable to the judicial process as is any private corporation operating for the benefit of its shareholders. *Clallam County v. United States*, *supra*, at 345; *F. H. A. v. Burr*, 309 U. S. 242, 245. Compare *Sloan Shipyards v. Emergency Fleet Corp.*, 258 U. S. 549. See also *United States v. Barker*, 12 Wheat. 559; and *Cooke v. United States*, 91 U. S. 389, 396, cited in *United States v. Summerlin*, 310 U. S. 414, 416.

2. But the corporations which are a part of the Government itself and carry on only the functions of the United States, stand on a quite different footing. They are created simply to do the Government's work. This Court has settled that the Government corporations which do exclusively the work of the United States are, equally with the other branches of the Government, performing "essential governmental functions," and that there is no difference as to essentiality in the functions of the United States. *Pittman v. Home Owners' Loan*

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Examples may perhaps be found in certain railroad corporations, in the national banks, and also in the American Legion, 41 Stat. 284, 285, the Boy Scouts of America, 39 Stat. 227, or the Grand Army of the Republic, 43 Stat. 358, 359. *Luxton v. North River Bridge Co.*, 153 U. S. 525; *Railroad Co. v. Peniston*, 18 Wall. 5; *Thomson v. Pacific Railroad*, 9 Wall. 579. See also *Bank of the United States v. Planters Bank of Georgia*, 9 Wheat. 904. There, in addition, unlike the federal Government, the State was exercising proprietary powers. *Helvering v. Therrell*, 303 U. S. 218.

*Corp.*, 308 U. S. 21, 32; *Graves v. O'Keefe*, 306 U. S. 466, 477; *State Tax Commission v. Van Cott*, 306 U. S. 511.\* The corporate form is adopted only as a matter of administrative efficiency, e. g., to secure flexibility of operations and convenience in such matters as annual appropriations and preaudits. *United States ex rel. Skinner & Eddy Corp. v. McCarl*, 275 U. S. 1; 6-8. These consideration have no relation to the governmental immunities of the United States and its agencies. See, *Clallam County v. United States*, 263 U. S. 341; *Graves v. O'Keefe*, 306 U. S. 466, 477. As this Court said in *Inland Waterways Corp. v. Young*, 309 U. S. 517, 523-524:

The motives which lead Government to clothe its activities in corporate form are entirely unrelated to the problem of safeguarding governmental deposits, and therefore irrelevant to the issue of *ultra vires*.  
\* \* \* The true nature of these modern devices for carrying out governmental functions is recognized in other legal relations

\* Similarly, it has often been recognized that RFC itself is a part of the United States, performing its governmental functions. Its purpose "is not profit to the government" but "the rehabilitation of finance and industry and commerce." *Baltimore National Bank v. State Tax Commission*, 297 U. S. 209, 211. See, also, *State Tax Commission v. Van Cott*, 306 U. S. 511; *Langer v. United States*, 76 F. (2d) 817, 823. See, also, *RFC v. Central Republic Trust Co., et al.*, 17 F. Supp. 263; *United States v. Arthur*, 23 F. Supp. 537; *United States v. Freeman*, 21 F. Supp. 593; *R. F. O. v. Graydon*, 16 F. Supp. 765; *R. F. C. v. Krauss*, 12 F. Supp. 44.

when realities become decisive. \* \* \*

The funds of these corporations are, for all practical purposes, Government funds; the losses, if losses there be, are the Government's losses. \* \* \*

The ultimate question of Congressional intention is whether Congress, when it consented to suit against RFC, intended to waive the immunity from liability for costs which attaches to other branches of the Government. This inquiry is aided if one looks at the actual corporation which Congress created and at the duties which it was to perform.

The Reconstruction Finance Corporation Act of January 22, 1932, provides that RFC's capital stock of \$500,000 is to be subscribed exclusively by the United States, its sole stockholder (§ 2).<sup>\*</sup> Its obligations, which are fully and unconditionally guaranteed by the United States, are issued and marketed through the Secretary of the Treasury and are treated as public debt transactions (§ 9). It is authorized to act as a depository of public monies and as financial agent of the United States and in turn is authorized to deposit its monies with the Treasury (§§ 7, 12). Upon its liquidation, either by itself during the first fifteen years (§ 4) or thereafter by the Secretary of the Treasury

<sup>\*</sup> The references are to the Reconstruction Finance Corporation Act, as amended, save where other sources are specifically noted. The provisions of this Act, together with other relevant statutes, are set forth in the pamphlet of laws filed with this brief.

(§ 13), any surplus is to be carried into the miscellaneous receipts of the Treasury (§ 13). Its management is entrusted to a Board of Directors appointed, as are other officers of the United States, by the President by and with the consent of the Senate (§ 3).<sup>10</sup> See also 75 Cong. Rec. 1916. And recently, for reasons of economy and efficiency, it was grouped under a Federal Loan Agency which was to supervise the administration and be responsible for the coordination of the functions and activities of various governmental lending agencies. A quarterly report of its operations is made to Congress (§ 15). Administrative expenses are subject to the annual appropriation acts (see *e. g.*, First Deficiency Appropriation Act, Fiscal Year 1936). And it has been given the franking privilege (§ 4).

The powers conferred from time to time upon RFC disclose both the complexity of the economic problems which the United States, through RFC and other agencies, intended to alleviate and the reliance placed by Congress upon RFC as the appropriate agency through which to act.<sup>11</sup>

<sup>10</sup> The original Board consisted of the Secretary of the Treasury, the Governor of the Federal Reserve Board, the Farm Loan Commissioner, and four other Directors; it consists now of five members, no more than three of whom may be members of the same political party and no more than one from any single Federal Reserve District (§ 3).

<sup>11</sup> The intimate link between RFC and the fiscal powers of Congress becomes more apparent when one considers the extent to which currency has been supplemented by credit

RFC is authorized to make loans and otherwise give financial aid in a wide variety of situations, "to aid in financing agriculture, commerce, and industry, including facilitating the exportation of agricultural and other products" (§ 5). A description of some of the powers conferred to meet these varied conditions is set forth in the margin for the information of the Court.<sup>12</sup>

instruments as a medium of exchange, and the inability of Congress successfully to exercise its powers to tax and to borrow in a paralyzed financial community. See Hearings before the House Banking and Currency Committee on H. R. 5357, 74th Cong., 1st Sess., p. 213; Report of the Comptroller of Currency in 1919, Vol. 2, p. 36. In addressing itself to this distressed financial situation and in taking measures to protect and preserve financial agencies previously created by Congress, RFC is exercising traditional functions of the United States. Compare *Westfall v. United States*, 274 U. S. 256; *First National Bank v. Union Trust Co.*, 244 U. S. 416; *Farmers' and Mechanics' National Bank v. Dearing*, 91 U. S. 29; *McCulloch v. Maryland*, 4 Wheat. 316.

<sup>12</sup> RFC may, with the approval of the Interstate Commerce Commission, make loans to railroads engaged in interstate commerce "to aid in the financing, reorganization, consolidation, maintenance, or construction thereof" (§ 5). It is authorized to make loans to "any business enterprise when capital or credit, at prevailing rates for the character of loan applied for, is not otherwise available," "for the purpose of maintaining and promoting the economic stability of the country or encouraging the employment of labor" (§ 5d); to States for relief of destitution (§ 1 of Emergency Relief and Construction Act of 1932); and to aid in the relief of disasters caused by floods, tornadoes, cyclones, earthquakes, or conflagrations (§ 201 (a) (6), *id.*, as amended). It is authorized to make loans to States, municipalities, and political subdivisions and other public agencies "to aid in financing projects authorized under federal, state, or municipal law

More recently RFC was authorized to assist in the national defense program by organizing corporations and financing them and existing corporations in producing and acquiring strategic materials and in equipping and expanding plants for the production of needed supplies (§ 5d).

which are self-liquidating in character" (§ 201 (a), *id.*; see also § 5d); to make loans, "in order that the surpluses of agricultural products may not have a depressing effect upon current prices of such products \* \* \*, for the purpose of financing sales of such surpluses in the markets of foreign countries \* \* \*" (§ 201 (c), *id.*), and "to finance the carrying and orderly marketing of agricultural commodities and livestock produced in the United States" (§ 201 (d), *id.*). It can also make loans to enable drainage, levee, and irrigation districts and similar public bodies, to reduce and refinance their outstanding indebtedness incurred in connection with projects "devoted chiefly to the improvement of lands for agricultural purposes" (§ 36 of the Emergency Farm Mortgage Act of 1933).

RFC is likewise authorized to subscribe for the preferred stock, capital notes, and debentures of national banks and state banks and trust companies if, in the opinion of the Secretary of the Treasury, such institutions are "in need of funds for capital purposes" and if the Secretary "with the approval of the President" requests such a purchase (§ 304 of the Act of March 9, 1933, as amended, c. 1, 48 Stat. 6). It can subscribe for preferred stock or capital notes of insurance companies under similar conditions (Act of June 10, 1933, as amended, c. 55, 48 Stat. 119-122). It can also subscribe for the stock of national mortgage associations or of mortgage loan companies, trust companies, savings and loan associations, and other similar financial institutions organized under the laws of the United States or of any State "to assist in the reestablishment of a normal mortgage market" (§ 5c).

In addition to these discretionary financial powers RFC was directed by Acts of Congress to allocate and transfer various amounts to other branches of the Government. In this respect it acts in a capacity similar to that of the Treasury of the United States. Thus, for example, it was directed to make monies available to the Secretary of Agriculture (§ 2, and Act of February 4, 1933), to the Governor of the Farm Credit Administration (§ 5 of Farm Credit Act of 1933), to the Secretary of the Treasury (§ 2), and to the Farm Loan Commissioner (§ 32 of the Emergency Farm Mortgage Act of 1933), and was authorized to supply the funds to enable the Secretary of the Treasury to subscribe for the capital stock of the Home Owners' Loan Corporation on behalf of the United States (§ 4 of Home Owners' Loan Corporation Act of 1933). RFC was also directed to make available a substantial portion of its unobligated funds, if requested by the President, to be applied for relief purposes (Title 2, Emergency Appropriation Act, fiscal year 1935; Emergency Relief Appropriation Act of 1935).<sup>11</sup>

<sup>11</sup> That RFC's activities are limited only to the needs and objectives of the United States is also demonstrated by the provisions of the statutes extending its lending powers (e. g., Act of Jan. 26, 1937, as amended: "Provided, That in order to facilitate the withdrawal of the credit activities of the Corporation when from time to time during such period the President finds \* \* \* that credit for any class of borrowers to which the Corporation is authorized to lend is sufficiently available from private sources to meet legitimate

From the foregoing, it is apparent that RFC's activities, while they have been manifold, have been carried on exclusively in accordance with the needs of the United States and pursuant to purposes and restrictions that bear no relation to those governing the activities of private business organizations.<sup>14</sup>

C. RFC'S CORPORATE FORM AND THE SUE-AND-BE-SUED CLAUSE DO NOT CONSTITUTE A CONSENT TO THE TAXATION OF COSTS

1. The United States, as we have shown (pp. 6-10, *supra*), does not subject itself to liability for costs when it authorizes suits against itself, and RFC in every legal and practical sense is a part of the United States (pp. 10-18, *supra*).<sup>15</sup> It should follow, without more, that RFC is not liable for

demands upon fair terms and rates, the President may authorize the directors to suspend the exercise by the Corporation of any such lending authority for such time or times as he may deem advisable."

<sup>14</sup> By way of example, the dividend rate on banking associations' preferred stock purchased by RFC has from time to time been reduced by RFC in order that the funds it supplies might accomplish their purpose more effectively. See testimony of Mr. Jesse H. Jones before House Committee on Banking and Currency on H. R. 11047, 74th Cong., 2d Sess., p. 2. Pursuant to the statutory provisions, and as a matter of policy generally, loans are made only when credit, at prevailing rates for the character of loan, is not available from private sources. §§ 5, 5d; testimony of Mr. Jesse H. Jones before House Committee on Banking and Currency on H. R. 4240, 74th Cong., 1st Sess., p. 4. The loan involved in this case was made pursuant to Section 5d conferring authority to act "For the purpose of maintaining and increasing the employment of labor \* \* \*."

costs simply because Congress has authorized suits against it. Certainly, we think, no contrary implication is to be found which speaks with a clarity sufficient to overcome this natural syllogism which must have been in the mind of Congress when it created and authorized suits against RFC.

The argument to the contrary must rest only upon the choice of a corporate form through which the RFC is to carry on the work of the Government and the power given the RFC "to sue and be sued." Plainly enough, neither circumstance amounts to a waiver of the Government's immunity from costs. Such immunity is specific and is not waived unless Congress "has spoken in no uncertain terms" *Carlile v. Cooper*, 64 Fed. 472, 475 (C. C. A. 2d).

2. Indeed, to refer to the corporate form is not to solve the problem here, but merely to state it. Under the analysis indicated by this court in *Keifer & Keifer v. RFC and RACC*, 306 U. S. 381, the implications of use of the corporate form must be measured against "dominant contemporaneous opinion" (p. 389) and the judicial background of litigated cases (p. 391). Neither approach suggests any substitute for the specific authority necessary to exact costs from the Government.

The mere choice of the corporate form of organization should not outweigh the character of the functions and responsibilities imposed by Congress upon RFC (pp. 13-18, *supra*). It is this lat-

ter evidence that this Court has recognized in other legal relations "when realities become decisive." See *Inland Waterways Corp. v. Young*, 309 U. S. 517, 523-524; *Clallam County v. United States*, 263 U. S. 341. No reason is apparent why such evidence should not be equally decisive here. It follows that RFC, no more than other branches of the Government whose traditional functions it performs, cannot be taxed with court costs.

There is now and was in 1932 no "climate of opinion" favoring the taxation of court costs against the Government or against its corporate agencies such as RFC. Contrast *Keifer & Keifer v. RFC and RACG*, *supra*, at 392-394. Not one of the forty-odd corporations established by Congress during the past two decades for what, in a broad sense, are governmental ends (see list in *Keifer* case, *supra*, at 290-291n.) was specifically subjected to liability for court costs.<sup>15</sup>

The sue-and-be-sued clause, designed as it was to make judicial procedure available to and against RFC on its transactions, neither by its terms nor by its connotations includes the further consequence of liability for costs. The case at hand, in this respect, differs markedly from *F. H. A. v. Burr*, 309 U. S. 242. In that case this Court was determining neither the class nor the amount of the liability for which Congress had consented that its agency should be held responsible, but merely

<sup>15</sup> They are listed in the *Keifer* case, *supra*, at 390-391n. The lists include corporations which are a part of the Government as well as those which serve private or unofficial ends.

the existence of alternative remedies open to the employee and his creditors in order to enforce a conceded liability for wages earned. There was no doubt there that the same claim could have been pressed successfully by the employee who earned the wages owing; the question was whether this same claim could be asserted by his creditor, or whether, instead, a well-known form of civil process must be excluded from a sue-and-be-sued clause.<sup>18</sup> Here, the issue is broader than any delimitation of the types of procedures contemplated by a sue-and-be-sued clause. For, under an established line of decisions (pp. 7-9, *supra*) and as a practical matter, liability for costs is a separate substantive liability requiring additional and specific authority in order to fix it upon the Government.

Nor is there any line of cases that implied that RFC would be held liable for costs because of the corporate form or the sue-and-be-sued clause. On the contrary, all the cases raising this precise issue,

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<sup>18</sup> The decision in *F. H. A. v. Burr*, *supra*, was based upon the express language of the statutory consent to sue a particular agency; this Court observed that the words "sue and be sued" in their normal connotation embraced garnishment proceedings. The reference to the activities of the Federal Housing Administration was made merely for the purpose of determining whether the consent to suit should be narrowed to exclude by implication a particular and well-recognized type of remedy. It was with respect to the activities of the Federal Housing Administration that the case of *United States v. Summerlin*, *supra*, refused to permit the defense of a statute of limitations to be raised, where, as here, Congress has not expressed its intention in specific terms.

save only the decision below, have held that corporations performing governmental functions are not liable for costs. See *Federal Deposit Insurance Corp. v. Barton*, 106 F. (2d) 737 (C. C. A. 10th); *Federal Deposit Insurance Corp. v. Casady*, 106 F. (2d) 784 (C. C. A. 10th). See also *National Home v. Wood*, 81 F. (2d) 963 (C. C. A. 7th), affirmed, 299 U. S. 211, 212. Even with prophetic vision, Congress could not have supposed when it created RFC that liability for court costs would be predicated either up on the corporate form of the RFC or upon the sue-and-be-sued clause.

3. It is not sufficient to say, as did the court below, that costs are merely an incident to the judgment contemplated by the sue-and-be-sued clause. It is true enough that costs *if allowed* are an incident to judgment. Cf. *The Baltimore*, 8 Wall. 377, 390. But this throws no light upon whether or not they should be allowed. The many cases dealing with judgments against the United States (*supra*, pp. 7-9) show that costs are in no sense an inevitable incident of a judgment. The precise argument has been made and rejected with respect to costs urged to be incident to judgments against the United States. *United States v. French Sardine Co.*, 80 F. 2d) 325, 326; *United States v. Davis*, 54 Fed. 147, 153. It should have no more weight here.

The court below relied on the *Keifer* and *Burr* cases and on *United States v. Shaw*, 309 U. S. 495, to demonstrate that permission to sue an instru-

mentality of the United States should be liberally construed and that at times the Government's immunity must be affirmatively conferred by Congress if it is to be found. Those cases are not opposed to the contentions here advanced since they involved the question whether the United States and its instrumentalities were amenable to judicial process of one sort or another and were concerned with limiting legal irresponsibility on the transactions for which the instrumentalities were created. In the instant case the question is whether a particular substantive liability (see *supra*, p. 9n) may be imposed and a waiver of such immunity must be unmistakable. Cf. *Clallam County v. U. S.*, *supra*; *Munro v. United States*, 303 U. S. 36.<sup>17</sup>

4. The taxation of costs against RFC in the Circuit Court of Appeals for the Second Circuit raises no additional problems. The considerations mentioned in the course of our argument are equally applicable to all the inferior federal courts. Neither the district courts nor the circuit courts of appeals have been authorized by statute to tax costs against the Government or its corporate agencies.

<sup>17</sup> *Continental National Bank v. Rock Island Railway*, 294 U. S. 648, is not opposed. The question there was one of statutory construction and this Court held that RFC was not entitled to a preferred position in bankruptcy proceedings. A similar ruling had been given theretofore with respect to loans by the United States that did not involve a corporate instrumentality. *United States v. Guaranty Trust Co.*, 280 U. S. 478. Nor is *Sloan Shipyards Corp. v. Emergency Fleet Corp.*, 258 U. S. 549, opposed. In that case the Fleet Corporation was organized under the laws of the District of Columbia and the general power to sue and be sued conferred

Revised Statutes, Sec. 1001, as amended June 19, 1934, 28 U. S. C., Supp. V., Sec. 870, does not authorize the taxation of the costs on appeal against such agencies.<sup>18</sup> The question whether court costs are taxable in cases in which the United States or its agencies are parties is plainly and in specific terms left by this Act, as amended, to other provisions of law. Indeed, it supports the inference that the United States and corporations all the stock of which is owned by the United States shall, in the absence of a specific statute to the contrary, be treated alike with respect to court costs.<sup>19</sup>

by that law and by its charter was not restricted by Congress. Such a case is manifestly different from one involving a federally chartered corporation organized exclusively for governmental purposes. See *supra*, p. 10-13.

<sup>18</sup> It provides:

"Whenever an appeal, or other process in law, admiralty, or equity, issues from or is brought up to the Supreme Court, or a district court, either by the United States or by direction of any department of the Government or any corporation all the stock of which is beneficially owned by the United States, either directly or indirectly, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs. In case of an adverse decision, such costs as by law are taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted."

<sup>19</sup> Attention may be called to Rule 29 of the Rules of the Circuit Court of Appeals for the Second Circuit, which provides in part:

"4. Neither of the foregoing sections [i. e., providing for allowance of costs] shall apply to cases where the United States are a party; but in such cases no costs shall be allowed

D. THE ADDITIONAL ALLOWANCES MAY NOT IN ANY EVENT  
BE TAXED AGAINST RFC

A word should be added with respect to the additional allowances, presumably for attorney's fees (see R. 3, 4, 19), sought by the Menihan group. The reasons just advanced to support our position that costs are not taxable against RFC are, of course, equally applicable to such allowances. But there are other grounds militating most strongly against the decision that the District Court has power to tax additional allowances against RFC.

First, it should be noted, the claim of the Menihan group to these allowances is not based upon the establishment of a fund in which others share through its efforts. Nor was the practical equivalent of such a fund created for the benefit of others. Compare *Sprague v. Ticonic Bank*, 307 U. S. 161, 164-166, and authorities cited; *United States v. Equitable Trust Co.*, 283 U. S. 738, 744. The facts here show that the Menihan group was simply defending an action by RFC to enjoin trade-mark infringement and unfair competition.

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in this court for or against the United States, except where otherwise provided by statute."

As we have seen (*supra*, pp. 10-18), RFC is a branch of the United States Government, and it would follow that the quoted provision applies to it as well as to any other branch of the United States Government. Even if the statutory authority to sue and be sued could be said to *permit* the imposition of costs, there would not be present the explicit statutory provision as to costs contemplated by Rule 29. Cf. Rule 54 (d) of the Federal Rules of Civil Procedure.

Even where a fund is for all practical purposes created for the benefit of others, allowances "as between solicitor and client" are "appropriate only in exceptional cases and for dominating reasons of justice." *Sprague v. Ticonic Bank*, *supra*, at 167. And in the normal case such allowances would be taken out of the fund. *Rude v. Buchhalter*, 286 U. S. 451, 461; *United States v. Equitable Trust Co.*, 283 U. S. 738, 744. Here, quite to the contrary, allowances are sought to be taxed directly against RFC, presumably on the ground that RFC brought this suit to protect property of which the United States is the sole beneficial owner without just cause.

There may be cases which permit allowances "as between solicitor and client," even where no fund has been created, on the ground that the litigation is wholly baseless and unwarranted. But, if they exist, they represent a departure from the general rule that no such allowances are given. *Kansas City Southern Ry. v. Trust Company*, 281 U. S. 1, 9-11, reversing 28 F. (2d) 233, 240-246 (C. C. A. 8th); *Rude v. Buchhalter*, 286 U. S. 451, 459-461. And, in any event, such exceptional allowances must have been outside the contemplation of Congress when it created RFC and made it amenable to suit. They clearly are in the nature of penalties and Congress surely cannot be assumed to have subjected RFC to penalties. *Missouri Pac. R. R. v. Ault*, 256 U. S. 554, 563-565.

## CONCLUSION

For the reasons set out above, it is respectfully submitted that the decision of the court below should be reversed.

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DECEMBER 1940.

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CHARLES ELMORE CROPLEY  
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

No. 200.

RECONSTRUCTION FINANCE CORPORATION,  
*Petitioner,*

against

J. G. MENIHAN CORP., J. G. MENIHAN, SR., and  
J. G. MENIHAN, JR.,  
*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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**J. G. MENIHAN, JR.,**  
*Respondents.*

---

**BRIEF FOR RESPONDENTS IN OPPOSITION  
TO PETITION FOR CERTIORARI.**

**Statement.**

On the question as to the power of the United States District Court for the Western District of New York to award trial costs, and entertain a motion for an extra allowance to the respondents in an equity action brought by the petitioner, the Circuit Court of Appeals for the Second Circuit held that the District Court had such power. Petitioner asks this Court to grant certiorari to review such ruling.

### Opinions.

The opinion of the District Court is reported at 29 F., Supp. 853; and that of the Circuit Court of Appeals in 111 Fed. (2d) at page 940.

### Errata.

On page three of the petition, the learned counsel for the petitioner state that the Reconstruction Finance Corporation made a loan to the J. G. Menihan Corp. (one of the respondents) upon the security of certain collateral. This is incorrect. The loan was made to The Menihan Company in 1934. The respondent corporation was organized in 1937, and never borrowed any money from petitioner. A correct statement of the facts is found in the opinion of District Judge Burke at page 11 of the record.

### Question Presented on this Petition.

Are the decisions of this Court, denying immunity to governmental corporations, beginning with *Bank of the United States v. Planters' Bank of Georgia*, 9 Wheat, 904, and ending (to date) with *Federal Housing Administration v. Burr*, 60 S. Ct. 488, now to be reopened, overruled and reversed?

### Argument.

The petition (p. 4) assigns the following as error:

"The court below erred:

"1. In holding that court costs and additional allowances may be taxed against petitioner.

"2. In taxing costs in that court against petitioner.

"3. In reversing the orders of the District Court appealed from."

It would seem that the issue attempted to be presented involves solely a very ancient question, many times determined, as to the claims of immunity of governmental corporations. In this case, the immunity is claimed from costs only. In other cases, both the two above mentioned, and those of this Court and other Federal Courts listed below, immunity was claimed from liability, from suit, from garnishee or other third party process, and always explicitly denied. To suggest that a novel question is presented here would seem to us to profess an inability to see the woods for the trees.

Authorities follow:

*United States v. Strang*, 254, U. S. 491, 493.

*Sloan Shipyards Corp. v. United States Fleet Corp.*, 258 U. S. 549..

*Missouri Pacific R. Co. v. Ault*, 256 U. S. 554.

*Continental Nat. Bk. v. Rock Island Rwy Co.*, 294 U. S. 648, 684.

*Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 388.

*Pope v. Emergency Fleet Corp.*, 269 Fed. 319, 320.

*The Pesaro*, 277 Fed. 473.

*Federal Sugar Refining Co. v. United States Sugar Equalization Board*, 268 Fed. 575, 584.

*Providence Engineering Corp. v. Downey Shipbuilding Corp.*, 294 Fed. 641.

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*Lord & Burnham v. U. S. Shipping Bd. Emergency Fleet Corp.*, 265 Fed. 965.

*Inland Waterways Corp. v. Hardee*, 300 Fed. 678, 689.

*In re Missouri Pac. R. Co.*, 13 Fed. Supp. 888.

The status of these corporations, of which Congress has spawned a great number (the phrase is Mr. Justice Frankfurter's) was clearly defined by Chief Justice Marshall in *Bank of the United States v. Planters' Bank of Georgia*, 9 Wheat, 904, and has remained unchanged ever since. It has never been more clearly stated.

"It is, we think, a sound principle, that when the government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus many states of this Union who have an interest in banks, are not suable even in their own courts, yet they never exempt the corporations from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. *As a member of a corporation, the government never exercises, its sovereignty.*" (Italics supplied.)

It was restated by Mr. Justice Holmes in the *Sloan* case, *supra*, (258 U. S. 549, at page 567).

"If what we have said is correct, it cannot matter that the agent is a corporation, rather than a

single map. The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law."

This would seem lucid enough, but some kind of immunity was repeatedly urged (and refused) in some of the later cases cited above. In the *Keifer* case, *supra*, (306 U. S. 381) it became necessary for this Court to emphasize what it had said before, by saying, through Mr. Justice Frankfurter, that immunity was never presumed; that it never arose out of mere implication; that it could be conferred by Congress, of course, but that unless it had been expressly so conferred, it must be deemed to have been withheld. "Congress may of course," he says, "endow a governmental corporation with the government's immunity. But always the question is, has it done so?" And the Court ruled that the immunity, to exist at all, must be found in the Act of Congress creating the corporation, and that the immunity claimed was not there so found.

It was thought that this decision, read in the light of Chief Justice Marshall's statement in *Weston v. City Council of Charleston*, 2 Pet. 449, 464\* and the plain words of the statute making costs a part of the judgment,\*\* as well as the rulings of this Court in

\* "The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit."

\*\* "Same, bill of; taxation. The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause." Sec. 830, Title 28 U. S. C.

*Newton v. Consolidated Gas Co.*, 265 U. S. 78, P. 83 to the effect that a decree for costs is a judgment in a suit; and in *The Baltimore*, 8 Wall, 377, 390, to the effect that costs are an incident to the judgment,\* would, when construed together, remove this controversy from that which Abraham Lincoln called "the realm of pernicious abstraction." However, since more than one of these governmental corporations claimed another immunity (that from third party process), and had had this claim allowed in some of the State Courts\*\* it therefore became necessary for this Court to restate and reaffirm its position on the legal status of these governmental corporations, especially in regard to their constantly recurring claims to share some part of the immunity of the sovereign. This it did, clearly and emphatically, in *Federal Housing Administration v. Burr*, 60 S. Ct. 488, using the following language:

"As indicated in *Keifer & Keifer v. Reconstruction Finance Corporation*, *supra*, we start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned. *Keifer & Keifer v. Reconstruction Finance Corporation*, *supra*. Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it

\* cf. *Rooney v. Second Ave. R. R. Co.*, 18 N. Y. 368, 369, 370.

\*\* See cases referred to in footnote to *Federal Housing Administration v. Burr*, 60 S. Ct. 488, 489.

must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be."

### The Alleged Conflict.

Petitioner asserts that the ruling of the Court below is in direct conflict with three decisions; *National Home v. Wood*, 81 Fed. (2d), 963; *Federal Deposit Insurance Corp. v. Barton*, 106 Fed. (2d) 737; and *Federal Deposit Insurance Corp. v. Casady*, 106 Fed. (2d) 784; and this supposed conflict is urged as a reason for granting the writ.

In the *National Home* case, the Court held that the suit was in reality against the United States, despite its form, and denied costs for that reason. Its conclusion was inescapable, in view of the express provisions of Title 38, Section 11d (U. S. C.). There Congress says in so many words that all contracts and other valid obligations of the Home shall continue and be obligations of the United States, "and the United States shall be considered as substituted for said corporation with respect to all such demands either by or against said corporation."

It was because of this statute that the Supreme Court held that costs were properly denied. (299 U. S. 211, note page 212.)

In the *Barton* case the title of the plaintiff to the insured deposit was not entirely clear. So the Circuit Court of Appeals held, in affirming, that it was the duty of the defendant, under Title 12, Section 264, Sub. L (7) U. S. C. to present the issues for the determination of the Court, and for that reason costs should not be taxed against it. Under the circumstances presented in the Court's opinion, we cannot see how it could have held otherwise.

The *Casady* case was an action at law against the Federal Deposit Insurance Corporation. The plaintiff prevailed, and on appeal the judgment was modified by striking out the award of costs in the following language:

"The question is raised as to costs. Appellant being a governmental agency, costs should neither be awarded in its favor nor against it in this action, and the adjudication against the defendant as to costs is eliminated. Paragraph (d), Rule 54, Federal Rules of Civil Procedure for District Courts."

then follow citations of several cases holding that the appellant and other governmental corporations are governmental agencies, and that only. The immunity of the latter from costs was assumed, not decided; and the text of the language used shows that the Court did not have in mind the text of Rule 54(d). We say this because there is nothing in Rule 54(d) which denies costs to a successful governmental agency, to a successful governmental officer, or to the United States, itself, when it prevails. Of course, such a rule prevails

in this Court (Rule 32.5) and is also found as regards appellate costs in many of the rules of the different Circuit Courts of Appeal, usually expressly limited however to instances where the United States is a party; and it would seem probable that the learned Tenth Circuit had these rules in mind, rather than Rule 54(d). In other words, it appears to be a plain oversight, which might readily have been corrected by petition for rehearing.\*

However this may be, the decision of the *Casady* case must be considered as overruled by the holding of this Court in the *Burr* case; since the denial of the greater immunity would seem to dispose of the lesser one.

To rule otherwise would seem to us to be granting to these governmental corporations an immunity not only greater than that of governmental officers (*U. S. ex rel. McBride v. Schurz*, 102 U. S. 378; *U. S. v. Boutwell*, 17 Wall, 604), but also an immunity greater than that of the sovereign itself, for under certain statutes, the United States is amenable to costs (Title 28, U. S. C. 761; Title 46 U. S. C. 781), and Congress appropriates the funds to pay them (First Deficiency Appropriation Act 1940, Chapter 77, 3rd Session 76th Congress, Sec. 202, (a) and (b)).

The contrary suggestion also carries with it an implication that this Court intended, by rule, not only to overturn its own holdings for more than one hundred fifty years, but also to exceed the limitations imposed

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\* The point seems not to have been stressed,—Appellees' brief contains the following language: "The question of costs is raised by appellant and with this we may have little interest in view of the certainty that if appellees prevail, they will in no event be charged with the costs." Appellees' counsel advises that the costs in dispute did not exceed Ten dollars.

by Congress upon its rule making authority,\* although the exact contrary was held by both of the Courts below in this case (Record, p. 19, fol. 94, p. 26), and was in fact urged by the petitioner, itself.

In the light of these considerations, it is believed that there is no such confusion or conflict now existing in the Courts below as to lead to disharmony in decision. The question sought to be presented by the petition, involving as it does solely the status of these governmental corporations before the law, no longer appears to be an open one. To treat it as such at this late date would be (if we may paraphrase a jurist below) a step obviously undesirable.

### Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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\* "Said rules shall neither abridge, enlarge or modify the substantive rights of any litigant." Title 28, Sec. 723 (a) U. S. C. Act of June 10, 1934, ch. 651, secs. 1 and 2.

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**DEC 16 1940**

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*Petitioner,*

**v.**

**J. G. MENIHAN CORP., J. G. MENIHAN, SR., and**  
**J. G. MENIHAN, JR.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT**  
**COURT OF APPEALS FOR THE SECOND CIRCUIT.**

**BRIEF FOR RESPONDENTS.**

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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1940.

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No. 200.

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RECONSTRUCTION FINANCE CORPORATION,  
*Petitioner,*  
against  
J. G. MENIHAN CORP., J. G. MENIHAN, SR., and  
J. G. MENIHAN, JR.,  
*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

---

BRIEF FOR RESPONDENTS.

---

Opinions Below.

The opinion of the District Court is reported in 29 Fed. Supp. at page 853. The opinions of the United States Circuit Court of Appeals for the Second Circuit are reported in 111 Fed. (2d) beginning at page 940.

### **Jurisdiction.**

The decree of the Circuit Court of Appeals was entered on May 23rd, 1940 (Record, p. 19). The petition for a writ of certiorari was granted by this Court on October 14th, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925.

### **Question Presented.**

Has the District Court power to impose costs upon the petitioner, a corporate agency of the United States?

### **Statement of Facts.**

In 1934 the Reconstruction Finance Corporation made three separate loans to The Menihan Company (not the respondent) aggregating Two hundred and fifty thousand Dollars (\$250,000.00). This Company was unable to pay, and went into bankruptcy. Among the assets pledged by it to the petitioner were its trademarks and trade names, "Menihan," and "Arch-Aid." On a Trustee's sale in bankruptcy, the petitioner purchased substantially all the real estate and personal property of the bankrupt, including its trademarks and trade names (R. pp. 5-6).

In 1937 the respondent corporation, J. G. Menihan Corp., was formed, with J. G. Menihan, Sr., as its president. He had been president of the old corporation. The new company began the manufacture and sale of shoes, using the trademarks and trade name "Menihan" and "Arch-Aid."

In September of 1937, the Reconstruction Finance Corporation advertised for sale substantially all of the assets

of the bankrupt which it had purchased from the Trustee in bankruptcy. This was immediately before this suit was commenced on September 30th, 1937. The sale was had on October 3rd, 1937. Petitioner then disposed of, to the public, without restriction, all the physical assets of the bankrupt except an empty factory building. It made no attempt to sell the trademarks and trade names.

This suit was brought to enjoin the respondent corporation and J. G. Menihan, Sr., and J. G. Menihan, Jr., from using the trademarks and trade names above described in respondent corporation's business (R. 7, 8). Aside from the question whether the Messrs. Menihan could be restrained from using their own surnames in their business, whether in corporate form or not, and the question whether a valid trademark could exist in the purely descriptive words, "Arch-Aid," the plaintiff's case was hopeless from the start. The R. F. C. having sold everything to which a trademark could attach, the Court below correctly held that it had no right to a trademark in gross, and that such a thing could not exist (R. 7).

It further determined that even if the trademark "Arch-Aid" could be held to have acquired a secondary meaning, a decree awarding the plaintiff the exclusive use of it would lead to a potential fraud upon the public (R. 9).

All the facts upon which the District Court based its decision dismissing the complaint upon the merits were known to the plaintiff, either prior to the commencement of its action, or after the sale on October 3rd, 1937. Its maintenance of the action thereafter was without probable cause, for while probable cause may arise from a mistake of fact,

it can never be predicated upon a mistake of law (*Director General of Railroads v. Kastonbaum*, 263 U. S. 25, 27, 28). The maintenance of this suit after the plaintiff's transactions on October 3rd, 1937, seems <sup>purely</sup> ~~not only~~ vexatious, but ~~vindictive and venomous~~. Had the plaintiff obtained a preliminary injunction (it asked for it in the complaint, R. 3) it might, in a subsequent action, have been held liable for the whole expense and damage to which it put the respondents in defending this suit. Instead, when asked to pay only such expenses as are allowed as statutory costs, and a limited extra allowance, to recoup in a small part only, this expense and damage, petitioner hides behind the dignity and sovereignty of the United States, to which it asserts it is still tethered by the umbilical cord.<sup>1</sup>

### Summary of Argument.

The United States are immune from liability, from suit, and from costs, by reason of their sovereignty. This is undisputable. However, consent to liability to suit and to costs may be granted by Act of Congress. Even when consent is given, it may be modified or wholly withdrawn at any time, even after suit is brought.

*Imhoff Berg Silk Dyeing Co. v. U. S.*, 43 Fed. (2d), 836.

*U. S. v. Henszen*, 206 U. S. 237.

The sovereign is not liable for costs ordinarily, whether plaintiff or defendant, but this immunity does not arise because costs are an incident of the suit or of the judgment, or because they are a separate and substantive right. It

1. "Thou wear a lion's hide! Doff it for shame,  
"And hang a calfskin on those recreant limbs."  
(King John, Act III, Scene 1)

arises because consent has not been obtained, or because, if obtained, it is not broad enough to cover the claim or case. The waiver must be found in an Act of Congress, and there is no liability outside the express terms of the Act.

But this immunity of the United States, arising by reason of their sovereignty, does not pass to their creatures by implication. Congress can confer it by express grant (*Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, p. 389), "but always the question is, has it done so." The answer to this question would seem solely to be found in the Act erecting the particular corporation, for if the Act is silent on the subject, no immunity is implied (*ibid*, page 393).

An examination of the Act erecting the Reconstruction Finance Corporation discloses no express grant of immunity from costs, whether they are to be considered an incident of the suit or a separate substantive right or liability. Rather, the phrases therein conferring immunity (15 U. S. C. 610, 47, Stat. 10) from taxes, except upon real estate, coupled with the phrase, "to sue and be sued," would seem to delimit its exemptions, and to destroy its claim of non liability for incidents of a permitted suit or substantive matters to be adjudicated therein.

If ordinary court costs are permissible, there seems to be no adequate reason why an additional allowance cannot be granted. The power of a Federal Court of Equity to grant such an allowance has been recognized by this Court in a long line of decisions, of which the latest appears to be *Sprague v. Ticonac National Bank*, 307 U. S. 161, and see cases on the margin at pages 164 and 165.

These considerations would seem also to dispose of the objections made to the allowance of costs in the Circuit Court of Appeals, and to require an affirmance of the judgment below.

### Argument.

#### A. THE IMMUNITY OF THE UNITED STATES FROM COSTS, EXCEPT BY THEIR EXPRESS CONSENT, IS BEYOND QUESTION.

Hamilton, in the *Federalist* (No. 81) makes these profound remarks:

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. . . . The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will."

quoted from *Hans v. State of Louisiana*, 134 U. S. 1.

And indeed it would seem that this conclusion is inescapable, for "Sovereignty," as defined, "imports the supreme absolute and uncontrollable power by which any independent state is governed." The definition is Judge Cooley's, but the exemption seems to be of ancient origin. "The King is below the law, although he is below no man and below no court of law." (*Pollock & Maitland, History*

of *English Law*, Second Edition, Volume 1, pp. 515, 516.)

These learned authors doubt the existence of any prior doctrine to the contrary, and add that if Henry III had been capable of being sued, he would have passed his life as a defendant.

True, the immunity of the United States arises solely by implication. Mr. Justice Frankfurter said in the *Keifer* case, *supra*, that it was academic to inquire whether it rests on the theory that the United States is deemed the institutional descendant of the Crown, or on a metophysical doctrine, there stated, "that there can be no legal right as against the authority that makes the law on which the right depends."

But sovereignty imports supremacy, and supremacy is entire and indivisible. If it is divided, neither part is supreme as to the other. The suggestion implies a contradiction in terms, and the sovereign cannot bestow any part of its sovereignty and remain sovereign, i. e., supreme. It can, if it will, grant to its creature an attribute of its sovereignty, e. g., immunity from suit or liability, but not the sovereignty itself. To do so is to deny its own existence.

The necessary deduction is that any attribute of the sovereign, to be enjoyed by another, must be expressly granted, or, as phrased by Mr. Justice Frankfurter (*Keifer & Keifer v. R. F. C.*, *supra*), "Therefore the government does not become the conduit of its immunity in suits against its agents or instrumentalities simply because they do its work."

**B. THE STATUS OF GOVERNMENTAL OR GOVERNMENT OWNED CORPORATIONS BEFORE THE LAW IS PRECISELY THAT OF PRIVATELY OWNED CORPORATIONS.**

This doctrine was first enunciated by Chief Justice Marshall in *Bank of the U. S. v. Planters' Bank of Georgia*, 9 Wheaton 904, and has remained unchanged ever since. It has never been more clearly stated:

"It is, we think, a sound principle, that when the government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus many states of this Union who have an interest in banks, are not suable even in their own courts, yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. *As a member of a corporation, the government never exercises its sovereignty.*"

This would seem to make clear that there is, and can be, no immunity by implication.

Nevertheless, so far as we can ascertain, neither the petitioner herein, nor any of its associates whose stock is owned wholly or in part by the United States, has voluntarily acquiesced in this decision. They and all of them claim, or have claimed, immunity on one or both of two theories; one that by some fallacious but *soi disant* indent of cover-

ture, they have become, as it were, brides of the sovereign, and, as such, entitled to the royal prerogative; the other, that by immersion in the Stygian waters of the Potomac, they have been made, like Achilles, invulnerable to the attacks of mortal man.

*United States v. Strang*, 254 U. S. 491, 493.

*Pope v. Emergency Fleet Corp.*, 269 Fed. 319, 320.

*Pullman Palace Car Co. v. Missouri Pac. Ry. Co.*,  
115 U. S. 587.

*Salas v. United States*, 234 Fed. 842 (C. C. A. 2).

*Panama R. Co. v. Minnix*, 282 Fed. 49-50.

*The Pesaro*, 277 Fed. 473.

*Federal Sugar Refining Co. v. United States Sugar  
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*Keifer & Keifer v. Reconstruction Finance Corp.*,  
306 U. S. 381, 388.

*Ingersoll Rand Co. v. U. S. Shipping Bd.*, 195 App.  
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*Providence Engineering Corp. v. Downey Ship-  
building Corp.*, 294 Fed. 641 (C. C. A. 2).

*Pennell v. Home Owners' Loan Corp.*, 21 Fed.  
Supp. 497.

*Inland Waterways Corp. v. Hardee*, 300 Fed. 678,  
689.

*In re Missouri Pac. R. Co.*, 13 Fed. Supp. 888.

*Lord & Burnham v. U. S. Shipping Bd. Emergen-  
cy Fleet Corp.*, 265 Fed. 965.

In all of these cases, some sort of immunity was claimed, and in every one, the claim was rejected. As was said by Mr. Justice Holmes in *Sloan Shipyards v. U. S. Fleet Corp.*, 258 U. S. 549, at page 567,

"These provisions sufficiently indicate the enormous powers ultimately given to the Fleet Corporation. They

have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man we doubt if any one would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of Government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. *Osborn v. Bank of United States*, 9 Wheat. 728, 842, 843, 6 L. Ed. 204; *United States v. Lee*, 106 U. S. 196, 213, 221, 1 Sup. Ct. 240, 27 L. Ed. 171. The opposite notion left some traces in the law, (1 Roll. Abr. 95, *Action sur Case*, T.) but for the most part long has disappeared.

"If what we have said is correct it cannot matter that the agent is a corporation, rather than a single man. The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law."

This would seem lucid enough, but some kind of immunity was repeatedly urged (and refused) in some of the later cases cited above. In the *Keifer case*, *supra*, (306 U. S. 381) it became necessary for this Court to emphasize what it had declared before, by saying, through Mr. Justice Frankfurter, that immunity was never presumed; that it never arose out of mere implication; that it could be conferred by Congress, of course, but that unless it had been

expressly so conferred, it must be deemed to have been withheld. "Congress may of course," he says, "endow a governmental corporation with the government's immunity. But always the question is, has it done so?" And the Court rules that the immunity, to exist at all, must be found in the Act of Congress creating the corporation, and that the immunity claimed was not there so found.

It was thought that this decision, read in the light of Chief Justice Marshall's statement in *Weston v. City Council of Charleston*, 2 Pet. 449, 464<sup>1</sup> and the plain words of the statute making costs a part of the judgment<sup>2</sup> as well as the rulings of this Court in *Newton v. Consolidated Gas Co.*, 264, U. S. 78, p. 83 to the effect that a decree for costs is a judgment in a suit; and in *The Baltimore*, 8 Wall, 377, 390, to the effect that costs are an incident to the judgment<sup>1</sup>, would, when construed together, remove this controversy from that which Abraham Lincoln called "the realm of pernicious abstraction." However, since more than one of these governmental corporations claimed another immunity (that from third party process), and had had this claim allowed in some of the State Courts<sup>2</sup> it therefore became necessary for this Court to restate and reaffirm its position on the legal status of these governmental corporations, especially

1. "The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit."

2. "Same, bill of; taxation. The bill of fees of the clerk, Marshall, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause." Sec. 830, Title 28 U. S. C.

1. cf. *Rooney v. Second Ave. R. R. Co.*, 18 N. Y. 368, 369, 370.

2. See cases referred to in footnote to *Federal Housing Administration v. Burr*, 309 U. S. 242, 243.

in regard to their constantly recurring claims to share some part of the immunity of the sovereign. This it did, clearly and emphatically, in *Federal Housing Administration v. Burr*, 309 U. S. 242, using the following language:

"As indicated in *Keifer & Keifer v. Reconstruction Finance Corporation*, *supra*, we start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned. *Keifer & Keifer v. Reconstruction Finance Corporation*, *supra*. Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be."

But, reluctantly conceding the authority of these cases, petitioner now asserts that there is something peculiar about costs which distinguishes that item from the other incidents of a suit. "Costs," it states, "are a substantive liability," and therefore not included within either mean-

ing or connotation of the "sue and be sued" clause. There seems to be some confusion of thought here. We see no compelling reason why they cannot be both. If, however, they represent a substantive liability, rather than an incident of suit, then counsel's argument would seem to be this:

1. Congress allows R. F. C. (or the other governmental agencies) to sue and be sued.

2. This means that R. F. C. can sue for a substantive liability (such as breach of contract, tort, etc.), and may be sued for the same.

3. Costs are a substantive liability.

4. Therefore, R. F. C. may *not* sue or be sued for the same.

5. This proves that either Congress or ourself (petitioner) is suffering from intellectual strabismus. *cf. Keifer & Keifer v. R. F. C., supra*, 306 U. S. 381, at pages 393 and 394.

If premises 1, 2, and 3 are sound, as they are asserted to be, then it would seem that the conclusion (4) would have to be altered. Otherwise, in the words of the late Timothy D. Sullivan "onions is fruit."

Nor can we construe the phrase "sue and be sued" as having any more or less than the ordinary meaning. It is not a grant of power, much less a grant of immunity, but is a condition of its creation and existence.

"The State of Delaware allowed defendant to be created, but as a condition of its creation and exist-

ence, it afforded the right to anyone to sue the corporate entity which it thus created."

*Federal Sugar Refining Co. v. U. S. Sugar Equalization Board, Inc.*, 268 Fed. 575, 584.

But petitioner's counsel say that there is no difference in essentiality between the functions of the United States, citing *Pittman v. Home Owners' Loan Corporation*, 308 U. S. 21, and *Graves v. O'Keefe*, 306 U. S. 406. This we concede to be so. But, in *Brush v. Commissioner of Internal Revenue*, 300 U. S. 352, this Court confessed itself at a loss to make a definition of "essential governmental functions" which would cover all cases (op. pp. 361, 362), and in *Helvering v. Therrell*, 303 U. S. 218, at page 223, it repeated this statement, "By definition precisely to delimit 'delegated powers' or 'essential governmental duties' is not possible." But the two cases cited by petitioner (*Pittman v. Home Owners' Loan Corp.* and *Graves v. O'Keefe*, both *supra*), while they involve tax questions, are valuable as illustrative of the manner in which immunity can solely be conferred. The *Pittman* case arose out of an attempt on the part of the State of Maryland to assess a recording tax on H. O. L. C. mortgages. This corporation had been exempted by Congress from all state or municipal taxes, as to its franchise, capital, reserves, and surplus, income and loans. This Court held that the tax was on loans, and that Congress had the authority, *by express grant*, to confer this exemption.

In the *Graves* case, there was no statutory exemption. This Court held that "silence on the part of Congress implies immunity no more than does the silence of the Constitution"; and further, that when "exemption" is claimed on the ground that the federal government is burdened by

the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity."

This throws light on the language used by Mr. Justice Frankfurter in the *Keifer* case, *supra*; "Congress may, of course, endow a governmental corporation with the government's immunity."

It would therefore seem plain beyond peradventure that immunity of any kind must be the subject of an express grant by Congress, and cannot arise by implication.

Costs have been held to be a substantive right, although ancillary to the judgment.

*United States v. French Sardine Co., Inc.*, 80 Fed. (2d) 320.

*Newton v. Consolidated Gas Company*, 265 U. S. 78.

*U. S. ex rel. McBride v. Schurz*, 102 U. S. 378.

*U. S. v. Boutwill*, 17 Wall 604.

and as such, would seem, of necessity, to be covered by the phrase "sue and be sued," for it is impossible to say that Congress intended to exclude this right or liability and include all others.

*Western Coal and Mining Co. v. Petty*, 132 Fed. 603, 604.

*Kettredge v. Race*, 92 U. S. 116.

*Trinidad Asphalt Co. v. Robinson*, 52 Fed. 347.

*U. S. v. Treadwell*, 15 Fed. 532.

*Cooper v. New Haven Steamboat Co.*, 18 Fed. 588.  
*Merritt v. Merritt*, 20 Fed. (2d) 541.  
*National Surety Co. v. Lyons*, 16 Fed. (2d) 688,  
 692.  
*Primrose v. Fenno*, 113 Fed. 375, 376.  
*Shreve v. Cheesman*, 69 Fed. 785.  
*Eldredge v. Jackson*, 2 Sawyer, 598, 600.  
*Treat v. Farmers' Loan and Trust Co.*, 185 Fed.  
 760, 763.  
*United States v. Davis*, 54 Fed. 147.

And it was held specifically in *Missouri Pacific R. R. v. Ault*, 256 U. S. 554, 563-565, that compensatory damages reasonably included interest and costs.

From the foregoing it would seem that the claimed immunity of governmental corporations from suit or from costs does not exist.

### C. THE RECONSTRUCTION FINANCE CORPORATION FORMS NO EXCEPTION TO THE GENERAL RULE.

The learned counsel for the petitioner in essence concedes that not every corporation created by Congress enjoys the immunity from costs which petitioner claims for itself (Brief page 10). They draw a supposed distinction between some governmental corporations (of which the Emergency Fleet Corporation and others are cited as examples, p. 11) and those like the R. F. C., whose functions, it is claimed, are purely governmental in character, because they are created simply to do the government's work.

On this phase of the issue, it would seem that the petitioner enters the contest badly disfigured. The backbone

of this argument is broken by the holding of this Court in the *Keifer & Keifer* case, *supra*, "The government does not become the conduit of its immunity in suit against its agents or instrumentalities merely because they do its work." (306 U. S. p. 388.) This case would seem to define the exact status of the petitioner herein.

However, it had been earlier defined.

"The Reconstruction Finance Corporation Act created a corporation and vests it with designated powers. Its entire stock is subscribed by the government, but it is nevertheless a corporation, limited by its character and by the general law. The act does not give it greater rights as to the enforcement of its outstanding credits than are enjoyed by other persons or corporations."

*Continental Nat. Bk. v. Rock Island Ry.*, 294 U. S. 648, 684.

And in *Baltimore National Bank v. State Tax Commission*, 297 U. S. 209, this Court pointed out that under the authority of *McCullock v. Maryland*, 4 Wheat. 316, that (R. F. C.) "a corporation so conceived and operated is an instrumentality of government without distinction in that regard between one activity and another."

Plainly, another situation arises when the question of state taxation of governmental instrumentalities is concerned. Such is the *Clallam County* case (*Clallam County v. United States*, 263 U. S. 341). That case was decided, like many others (*e. g. Pittman v. Home Owners' Loan Corp.*, *supra*), on the authority of *McCullock v. Maryland*, 4 Wheat 316, *supra*. But exemption from taxation (usually found in the Act erecting the corporation) does not mean exemption from suit and its corollary incidents. The con-

trary is the case, even when the significant words "sue and be sued" are omitted.

*Keifer & Keifer v. R. F. C., supra.*

Furthermore, as was pointed out by Mr. Justice Frankfurter in the *Keifer* case, Congress has spawned some forty of these corporations (list on margin of page 389) and "has always included amenability to law and without exception the authority to sue and be sued was included." Petitioner would have us believe that this phrase means one thing when applied to it, and quite another when applied to some or all of the other thirty-nine governmental corporations mentioned by Mr. Justice Frankfurter, presumably of a low order, "as also are these publicans." This contention is not new. It has even found support in some quarters.<sup>1</sup>

In the absence of a specific and manifest intent on the part of Congress to the contrary, it must be assumed that Congress attached the same meaning to this phrase in all cases. And Congress will be presumed to have used a word in its usual and well settled sense.

*United States v. Stewart*, 61 Sup. Ct. 102 (Adv. Sheets, decided Nov. 12, 1940).

But, asserts petitioner, "We are part of the government, itself." Well, so is a United States Commissioner. So is a

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1. "I don't know what you mean by 'glory,'" Alice said.

Humpty Dumpty smiled contemptuously.

"Of course you don't—till I tell you. I meant 'there's a nice knock down argument for you!'"

"But 'glory' doesn't mean 'nice knock down argument,'" Alice objected.

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

letter carrier. "True, as we have assumed, the Reconstruction Finance Corporation is a governmental agency, but so also is a national bank." (Cardozo, J., in *Baltimore National Bank v. State Tax Commission*, 297 U. S. 209 *supra*, 212.)

And this Court has steadfastly refused to discriminate between various types of governmental activities—starting with *McCulloch v. Maryland*, *supra*, and leaving the differentiation, if any, to be made by Congress.

So at length we return to the starting point of our discussion. Anything that can be said would only add to or contradict the words of Chief Justice Marshall in *Bank of the United States v. Planters' Bank of Georgia*, "As a member of a corporation, the government never exercises its sovereignty."

It would unduly protract this brief to discuss all the cases cited by the petitioner, so that those not apparently germane now receive no comment. It is necessary, however, to distinguish the cases relied on as showing the "trend of judicial opinion" in relation to costs. Of these, in *National Home v. Wood*, 81 Fed. (2d) 964, the Court held that the suit was in reality against the United States, despite its form, and denied costs for that reason. Its conclusion was inescapable, in view of the express provisions of Title 38, Section 11d (U. S. C.), providing for the dissolution and liquidation of the National Home. There Congress says in so many words that all contracts and other valid obligations of the Home shall continue and be obligations of the United States, "and the United States shall be considered as substituted for said corporation with respect to all such demands either by or against said corporation."

It was because of this statute that the Supreme Court held that costs were properly denied. (299 U. S. 211, note page 212.)

In *Federal Deposit Insurance Corp. v. Barton*, 106 Fed. (2d) 737, the title of the plaintiff to the insured deposit was not entirely clear. So the Circuit Court of Appeals held, in affirming, that it was the duty of the defendant, under Title 12, Section 264, Sub. L (7) U. S. C. to present the issues for the determination of the Court, and for that reason costs should not be taxed against it. Under the circumstances presented in the Court's opinion, we cannot see how it could have held otherwise.

In *Federal Deposit Insurance Corp. v. Casady*, 106 Fed. (2d) 784, the Tenth Circuit held that "Appellant being a governmental agency, costs should neither be awarded in its favor nor against it in this action \* \* \*. Paragraph (d), Rule 54, Federal Rules of Civil Procedure." Then follow citations of several cases holding that the appellant and other governmental corporations are governmental agencies, and that only. The immunity of the latter from costs was assumed, not decided; and the text of the language used shows that the Court did not have in mind the text of Rule 54(d). We say this because there is nothing in Rule 54(d) which denies costs to a successful governmental agency, to a successful governmental officer, or to the United States, itself, when it prevails. Of course, such a rule prevails in this Court (Rule 32.5) and is also found as regards appellate costs in many of the rules of the different Circuit Courts of Appeal, usually expressly limited however to instances where the United States is a party; and it would seem probable that the learned Tenth Circuit had these rules in

mind, rather than Rule 54 (d). In other words, it appears to be a plain oversight, which might readily have been corrected by petition for rehearing.<sup>1</sup>

However this may be, the decision of the *Casady* case must be considered as overruled by the holding of this Court in the *Burr* case; since the denial of the greater immunity would seem to dispose of the lesser one.

To rule otherwise would seem to us to be granting to these governmental corporations an immunity not only greater than that of governmental officers (*U. S. ex rel. McBride v. Schurz*, 102 U. S. 378; *U. S. v. Boutwell*, 17 Wall, 604), but also an immunity greater than that of the sovereign itself, for under certain statutes, the United States is amenable to costs, (Title 28, U. S. C. 761; Title 46 U. S. C. 781), and Congress appropriates the funds to pay them (First Deficiency Appropriation Act 1940, Chapter 77, 3rd Session 76th Congress, Sec. 202, (a) and (b)).

The contrary suggestion also carries with it an implication that this Court intended, by rule, not only to overturn its own holdings for more than one hundred fifty years, but also to exceed the limitations imposed by Congress upon its rule making authority,<sup>2</sup> although the exact contrary was held by both of the Courts below in this case (Record, pp. 10, 15), and is in fact urged by the petitioner, itself.

1. The point seems not to have been stressed.—Appellees' brief contains the following language; "The question of costs is raised by appellant and with this we may have little interest in view of the certainty that if appellees prevail, they will in no event be charged with the costs." Appellees' counsel advises that the costs in dispute did not exceed Ten dollars.

2. "Said rules shall neither abridge, enlarge or modify the substantive rights of any litigant." Title 28, Sec. 723 (a) U. S. C. Act of June 10, 1934, ch. 651, secs. 1 and 2.

D. THE ADDITIONAL ALLOWANCE SOUGHT IS NOT A PENALTY, AND THE DISTRICT COURT HAS POWER TO MAKE IT.

*Missouri Pacific R. Co. v. Ault*, 256 U. S. 554, *supra*, is wholly in our favor as to costs as such. The present case is in equity, and the power derives, as was pointed out clearly in *Sprague v. Ticomac National Bank*, 307 U. S. 161, from English Chancery practice as part of the historic equity jurisdiction of the United States. Also, says Mr. Pomeroy (Equ. Jurisp. Section 294),

"The third principle relates to the extent of the jurisdiction. While the equitable jurisdiction of the national courts is derived wholly from the United States Constitution and statutes, it is identical or equivalent in extent with that possessed by the English high court of Chancery at the time of the Revolution. The judicial functions and powers of the English Court of Chancery are held to have been conferred *en masse* upon the national judiciary; but not the peculiar administrative functions held by the chancellor as representative of the crown in its character of *parens patriae*. These latter functions of the English chancellor have not been granted to the United States courts, but are given to the several states, and are exercised either by the state legislatures or by the state tribunals. The United States Supreme Court has frequently laid down and acted upon this principle in deciding cases brought for the purpose of enforcing charitable trusts."

The subject is so ably discussed in the *Sprague* case that any paraphrasing of Mr. Justice Frankfurter would not only be inept, but supererogatory. However, it may be said to be a doctrine peculiar to equity practice. Equity never awards penalties. This proposition alone should refute the argument that the allowance has the nature of penalty.

**Conclusion.**

Since all the contentions of the petitioner appear to have been disposed of by prior decisions of this Court, it is respectfully submitted that the judgment of the Circuit Court of Appeals was right and should be affirmed.

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# SUPREME COURT OF THE UNITED STATES.

No. 200.—OCTOBER TERM, 1940.

Reconstruction Finance Corporation, Petitioner, vs. J. G. Menihan Corp., J. G. Menihan, Sr., and J. G. Menihan, Jr.	} On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
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[February 3, 1941.]

Mr. Chief Justice HUGHES delivered the opinion of the Court.

Petitioner, Reconstruction Finance Corporation, took mortgages and assignments of real and personal property of a corporation, including its trade-marks and trade names, as security for a loan. On a sale by the trustee in bankruptcy of the debtor, petitioner purchased the property. A new corporation undertook to use the trade-marks and petitioner sought an injunction. Decree went against petitioner. Defendants' application for costs and additional allowance was denied. 29 F. Supp. 853. This order was reversed by the Circuit Court of Appeals, 111 F. (2d) 940, and we granted certiorari because of a conflict of decisions. See *Federal Deposit Insurance Corporation v. Casaday*, C. C. A. 10th, 106 F. (2d) 784.

Rule 54(d) of the Rules of Civil Procedure provides that "costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law". This provision was merely declaratory and effected no change of principle.

The Reconstruction Finance Corporation is a corporate agency of the government, which is its sole stockholder. 47 Stat. 5; 15 U. S. C. 601. It is managed by a board of directors appointed by the President by and with the advice and consent of the Senate. The Corporation has wide powers and conducts financial operations on a vast scale. While it acts as a governmental agency in performing its functions (see *Pittman v. Home Owners' Loan Corporation*, 308 U. S. 21, 32, 33), still its transactions are akin to those of private enterprises and the mere fact that it is an agency of the government does not extend to it the immunity of the sovereign. *Loan Shipyards v. United States Fleet Corporation*, 258 U. S. 549, 566, 567. Congress has expressly provided that the

2 *Reconstruction Finance Corporation vs. Menihan Corpn. et al.*

Reconstruction Finance Corporation shall have power "to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal". There is nothing in the statutes governing its transactions which suggests any intention of Congress that in suing and being sued the Corporation should not be subject to the ordinary incident of unsuccessful litigation in being liable for the costs which might properly be awarded against a private party in a similar case.

We have had recent occasion to consider the status, in relation to suits, of a regional corporation chartered by the Reconstruction Finance Corporation and we have set forth the general principles which we think should govern in our approach to the particular question now presented. *Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381. In the *Keifer* case we did not find it necessary to trace to its origin the doctrine of the exceptional freedom of the United States from legal responsibility, but we observed that "because the doctrine gives the government a privileged position, it has been appropriately confined". Hence, we declared that "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work". *Id.*, p. 388. Recognizing that Congress may endow a governmental corporation with the government's immunity, we found the question to be "Has it done so?" That is, immunity in the case of a governmental agency is not presumed. We sought evidence that Congress had intended that its creature, considering the purpose and scope of its powers, should have the immunity which the sovereign itself enjoyed, and we noted the practice of Congress as an indication "of the present climate of opinion" which had brought governmental immunity from suit into disfavor. Accordingly, being unable to find that Congress had intended immunity from suit we denied it.

It was with a similar approach that we decided in *Federal Housing Administration v. Burr*, 309 U. S. 242, that the Federal Housing Administration was subject to be garnished under state law for moneys due to an employee. There, the Administrator under the National Housing Act was authorized "to sue and be sued in any court of competent jurisdiction, State or Federal". 49 Stat. 722. Starting from the premise indicated in the *Keifer* case that waivers by Congress of governmental immunity from suit should be liberally construed in the case of federal instrumentalities—that being in line with the current disfavor of the doctrine of governmental im-

*Reconstruction Finance Corporation vs. Menihan Corp'n. et al. 3*

munity—we concluded that in the absence of a contrary showing "it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be". Following that reasoning, the precise point of the decision was that the words "sue and be sued" normally embrace all civil process incident to the commencement or continuance of legal proceedings and hence embraced garnishment as part of that process.

These decisions chart our course. The Reconstruction Finance Corporation is expressly authorized to sue and be sued. It has availed itself of that authority to bring the defendants into court to answer the charge of trade-mark infringement. The defendants have successfully resisted the charge and the question is whether they should be denied the usual incidents of their success. We apply the principle that there is no presumption that the agent is clothed with sovereign immunity. We look as in the *Keifer* and *Burr* cases to see whether Congress has endowed petitioner with that immunity and we find no indications whatever of such an intent. We apply the farther principle that the words "sue and be sued" normally include the natural and appropriate incidents of legal proceedings. The payment of costs by the unsuccessful litigant, awarded by the court in the proper exercise of the authority it possesses in similar cases, is manifestly such an incident. The additional allowance made by courts of equity in accordance with sound equity practice is likewise such an incident. *Sprague v. Ticonic Bank*, 307 U. S. 161. We perceive no reason for holding that petitioner may avail itself of the judicial process in accordance with the authority conferred upon it and escape the usual incidents of that process in case its assertions of right prove to be unfounded. On the contrary, we think that the unqualified authority to sue and be sued placed petitioner upon an equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances.

The judgment of the Circuit Court of Appeals is affirmed.

*Affirmed.*

Mr. Justice BLACK took no part in the consideration and decision of this case.